CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF MISSOURI.

FEBRUARY TERM, 1875, AT ST. JOSEPH.

GEORGE G. NALL, Respondent, *vs.* THE ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY CO., Appellant.

1. *Instruction defining character and amount of testimony, etc.*—An instruction which undertakes to define the character and amount of testimony necessary to obtain a verdict is wrong.
2. *Railroads—Damages—Inclosed fields—Negligence.*—Where stock is killed on a railroad track along inclosed or cultivated fields, and the road is not fenced as required by law, (Wagn. Stat., 310, 11, § 43) the company will be liable, regardless of the question of negligence.
3. *Railroads—Damages—Venue—Instruction touching, etc.*—In suit against a railroad company before a justice of the peace, for the killing of stock, where the statement of plaintiff alleged that the injury occurred in the township where the justice held his office, and the evidence showed at what point it happened, *held*, that the statement gave the court jurisdiction of the case; and the place where the injury occurred having been shown by the testimony, the Supreme Court will not afterward reverse the case merely because the Circuit Court refused to instruct that proof of the venue must affirmatively appear in order to give plaintiff a verdict; and *semble*, that the instruction was itself objectionable and properly refused.

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Appeal from Clay Circuit Court.

D. C. Allen, for Appellant.

I. It must appear affirmatively from the testimony upon the trial *de novo* in the Circuit Court on appeal from a justice, that the animals were killed or injured in the township wherein the justice resided before whom the suit was brought. Unless this be the case, the Circuit Court has no jurisdiction. (Wagn. Stat., ed. 1872, 1, 9, p. 810, § 3, clause 5.)

II. Wagn. Stat., 520, 521, § 5, relieves a party who sues a railroad company for stock killed or injured on a portion of its railroad not enclosed by a lawful fence, or not in the crossing of any public highway, from proof of negligence, unskillfulness and misconduct, only when such party sues for simply the value of the stock, and the value in such case is all that the party can recover. Under § 43, (Wagn. Stat., 310–11) which entitles plaintiff to double damages, he must prove negligence. And he cannot sue under § 5 and § 43 in the same action. He must elect.

Dunlap & Austin, for Respondent.

I. The statement filed with the justice shows that the injuries complained of were done in Gallatin township, Clay county. The transcript of the justice shows that suit was instituted in said township, and before a justice of said township. The return of the officer shows that the writ was served in said township. Thus there can be no question as to the jurisdiction of the justice. (Hansberger vs. Pac. R. R. Co., 43 Mo., 196; Iba vs. The Han. & St. Jo. R. R. Co., 45 Mo., 470; Hudson vs. St. L., K. C. & N. R. R. Co., 53 Mo., 525.)

II. The statement need not allege that defendant failed to exercise due care or diligence. The question of negligence of defendant "cannot arise." (Gorman vs. Pac. R. R., 26 Mo., 452; Clark's Adm'x vs. Han. & St. Jo. R. R. Co., 36 Mo., 220; Tarwater vs. Han. & St. Jo. R. R. Co., 42 Mo. 193.

WAGNER, Judge, delivered the opinion of the court

This was an action commenced before a justice of the peace under the 43d section of the railroad law, for the killing and injury of certain cattle belonging to the plaintiff, by the cars run and operated by the defendant.

The statement filed with the justice alleged that the killing took place in Gallatin township, Clay county, at a place where there was no public road crossing, and where the road ran through inclosed and cultivated fields, and where the same was not fenced, and upon the evidence adduced the justice rendered a judgment for the plaintiff. Defendant then appealed to the Circuit Court, and upon a trial anew the same result followed.

At the trial, the killing and injury to the stock was clearly proved, and also the place where it occurred, and that it was done where the road passed through inclosed and cultivated fields, and no fences were erected. Plaintiff asked for no instructions, but the defendant asked for four, which were all refused, and this refusal constitutes the principal error complained of.

By the first instruction it was declared, that it devolved upon the plaintiff to prove that the damages alleged were inflicted by the trains of the defendant, and if it did not fairly and with certainty appear from the testimony that such was the fact, the finding should be for the defendant. The second instruction was, that it must affirmatively appear from the testimony that the damages alleged were inflicted in Gallatin township, in Clay County, Missouri, and if it does not so appear, then the finding must be for the defendant. The third instruction declared that plaintiff, having sued for double damages on account of the killing or injuring of the animals, and not for the value of the animals killed or injured, must in consequence, to entitle him to recovery, prove that the animals in controversy were killed or injured through the negligence of the defendants; and the plaintiff having failed to prove that in the killing or injuring of said animals there was any negligence, want of caution or misconduct on

the part of the defendant, if defendant it was that did the killing or injuring, the finding of the court must be for the defendant, even if it should be found that defendant's trains inflicted the injury, and that it was done in Gallatin township, Clay county, Missouri. The fourth instruction stated, that to entitle the plaintiff to recover in this action, he must not only prove negligence on the part of the defendant, but he must also prove all the material averments of his statement. These instructions were all objectionable and were rightfully refused.

The first instruction undertook to define the character and amount of testimony necessary to base a verdict upon, and was unauthorized. The second instruction required that it should affirmatively appear that the injuries were inflicted in Gallatin township. The place where the killing or the injury happened was a jurisdictional fact, and to be ascertained by proof like any other fact. The petition stated that it took place in Gallatin township. This gave the justice of the peace jurisdiction of the case, and the evidence showed at what point it happened. The question was for the triers of the fact, and we will not interfere.

The third instruction requires that actual negligence should be found to entitle plaintiffs to recover. Such is not the law. The 43d sec. under which this case was brought, after making it obligatory on the roads to fence their track, provides, that until such fences shall be duly made and maintained, the corporation shall be liable in double the amount for all damages which shall be done by its agents, engines or cars, to horses, cattle, mules or other animals, on said road, etc.; but after the fence shall be duly made and maintained, then the corporation shall not be liable for any such damages, unless negligently or willfully done. As the road had never complied with the law by erecting fences, as it should have done, the question of negligence was not an element in the case. The fourth instruction needs no comment. It requires the proving of negligence which was wholly unnecessary; and then undertakes to tell what shall be proved besides.

The court found the respective values of the cattle killed or injured as alleged in each several statement, and then doubled the amount; and in this we think it was entirely correct.

Let the judgment be affirmed; the other judges concur.

MORRIS ROGERS, Appellant, *vs.* SAMUEL TURNER, Respondent.

1. *Parent and child—Medical attentions to minor—Parent, when liable.*—A parent cannot be held for medical services rendered to a minor child, although coming under the head of necessaries, in a case where it appeared that they were given without the consent of such parent, and also that the parent employed a family physician of his own, and never refused to supply the child with medical attention.

Appeal from Carroll Circuit Court.

L. H. Waters, with J. W. Sebree, for Appellant.

I. If the medical services rendered were necessary to preserve life or health of respondent's son, his liability is fixed. (St. Ferdinand Loretta Academy vs. Bobb, 52 Mo., 358, and cases cited; Paul v. Hummel, 43 Mo., 122.)

No actual knowledge or express authority is necessary in order to charge the defendant, he being under a natural and legal obligation to maintain and support his minor son. The law, from motives of humanity and protection to the infant, raises an implied promise on the part of the parent, to pay for necessaries so furnished. (14 Johns., 92; 10 Johns., 244; 1 Caines, 385–6; Chaffee vs. Thomas, 7 Cow., 358, and cases there cited.)

Suppose defendant did have a family physician, the bill of exceptions does not show that his services were at all times available, but to the contrary.

Hale & Eads, for Respondent.

I. The services rendered were without the knowledge or consent of the parent.

II. The services rendered were not necessaries. The minor son was living with the defendant, who had a family physician, who would have given any medical attention necessary.

III. The defendant never refused to supply his son with the necessary medical attention, and without such refusal he could not be held liable. (Van Walkenburg vs. Watson, 13 Johns., 480.)

IV. It was the duty of plaintiff to inform respondent of the fact of his rendering medical attention to his son.

V. Respondent referred to 1 Pars. Cont., 247–256; Gordon vs. Patten, 17 Ver., 350.

NAPTON, Judge, delivered the opinion of the court.

This action was by a physician to recover a bill of $25 against defendant, for medical services to his son, in treating and curing the son of a disreputable disease.

The evidence clearly showed that the son was a minor living with the father, and consulted and employed the plaintiff without the knowledge of the father, who had a family physician. Neither the son or the plaintiff advised the father of the fact until eighteen months after the services were rendered.

The court gave all the instructions asked by the plaintiff; but rendered a verdict and judgment against him, and we think the judgment is right. Medical services of the character might be considered as necessaries; but the father never having refused to supply the son with any medical attention that might be necessary, was under no obligation to pay for services rendered without his knowledge or consent.

The judgment is affirmed; the other judges concur.

JAMES B. BELL, Defendant in Error, *vs.* WM. STROW, Garnishee, Plaintiff in Error.

1. *Execution—Garnishment on—Answer of garnishee—Payment of money to clerk, etc.*—The answer of a garnishee on execution alleging payments made to the clerk of the court, unless excepted to will be taken as true and sufficient. (Wagn. Stat., 667, § 19.) If excepted to as not showing conformity with the statute, the defect may be obviated by an amendment bringing it within the requirements of the law, as in certain cases (Wagn. Stat., 665, § 8) payment by the garnishee to the clerk is authorized.

Error to Livingston Circuit Court.

W. C. Samuel, W. P. Hall, and M. A. Low, for Plaintiff in Error.

SHERWOOD, Judge, delivered the opinion of the court.

There is no bill of exceptions in this case, but it is brought here on account of errors which are alleged to be apparent of record.

The record shows that Bell, the plaintiff, recovered judgment against George W. and Philip Swank on the 22nd day of April, 1871, for $992.50; that upon execution issued on such judgment, Wm. Strow was garnished upon the 29th of April, 1871, as the debtor of the judgment defendant.

The answer of the garnishee in substance states that on the 7th day of September, 1870, he bought of Philip Swank certain lands, for the sum of $3,900, $2,000 of which was paid in cash and the notes of the garnishee given for $634, $633 and $633, due respectively April 1st, 1872, April 1st, 1873, and April 1st 1874, each bearing ten per cent. interest from October 1st, 1870; that Swank on the day of purchase executed to garnishee a title-bond, whereby he bound himself, heirs, etc., without delay to perfect his title to the land purchased, and to make and deliver to him a deed with covenants of general warranty; that Swank failed to comply with the conditions of his bond, in not perfecting his title to a portion of the land sold; that the legal title to the same was still outstanding in the heirs of Catherine Swank, deceased, who

claimed their rights in the premises; and they were asked to be made parties; that Swank, at the time of the service of the garnishment, was the holder of the before mentioned notes; that the garnishee had paid taxes on a portion of the lands bought, and that on the 1st day of April, 1872, he paid into court, to the clerk thereof, one Berry, $729.10 the amount of the note, principal and interest, falling due on that day, taking his receipt therefor to abide the event of the suit, and subject to the order of the court.

This answer was neither excepted to nor denied.

Judgment was rendered on this answer on the 7th day of June, 1873, against the garnishee. This judgment recites, in substance, the allegations of the answer in respect to the purchase of the land and the notes given therefor, etc.; that Franklin P. Swank had interpleaded, and to him had been adjudged $1,400 of the purchase money for said land, together with interest on that sum, from the first day of October, 1870, out of the notes given by the garnishee; and that the perfecting of the title to the land purchased by the garnishee or the delivery to him of a deed therefor with the usual covenants of warranty, was a condition precedent to the payment of the purchase money. The judgment further recites, that two of the heirs of Catharine Swank, deceased, are entitled to $200 of the purchase money of the land, and the garnishee is ordered to retain that amount in his hands, out of the first note, and also the sum of $2.65 for taxes. The plaintiff is then adjudged to recover from the garnishee the sum of $378.77 with ten per cent. interest, upon the express condition, that the title of Philip Swank is perfected to the land purchased, and a deed in conformity to the title-bond, executed and delivered to the garnishee. The judgment then concludes with an order requiring Berry, late clerk of the court, to pay over to the sheriff, the sum of $729.10, the amount of the first note, paid or deposited with the clerk by the garnishee.

If payment had not been made of the $729.10 to the clerk by the garnishee, his indebtedness of $1,900, with inter-

est thereon at ten per cent. from the first day of October, 1870, would have amounted to $2,409.29. But the court, by requiring him to pay about that sum, evidently treated the payment to the clerk as a nullity; and the order was no doubt made upon the former clerk, in the hope that he might respond to it by paying over the money, rather than in the belief that any legal measures to exact compulsory payment, existed.

Under the circumstances of this case, however, the ruling of the court, which in effect required the garnishee to pay the same sum twice, was unquestionably erroneous.

His answer not having been excepted to or denied, should have been deemed as true and sufficient. (Wagn. Stat., 667, § 19.) Whether the payment to the clerk was valid will not, therefore, be discussed. Had the answer been excepted to, any supposed defects therein might have been obviated by amendment, as in certain cases, detailed in Wagn. Stat., 665, § 8, payment by the garnishee to the clerk is an authorized one.

Judgment reversed and the case remanded; the other judges concur.

JOHN C. WADDELL, *et al.*, Respondents, *vs.* EBENEZER BLACKISTON, Appellant.

1. Case stricken from docket for want of order granting appeal.

Appeal from Buchanan Circuit Court.

Hill & Carter, for Appellant.

Thomas & Ranney, with A. H. Vories, for Respondents.

SHERWOOD, Judge, delivered the opinion of the court.

As there is no order apparent of record granting an appeal in this cause, the same must be stricken from the docket. Judge Vories not sitting; the other judges concur.

JOHN FRAZIER AND SARAH E. FRAZIER, Appellants, *vs.* SAMUEL BRYANT, Respondent.

1. *Surveys—Lost interior corners—Missouri Statutes and laws of United States do not conflict.*—The method prescribed by the statute for establishing lost quarter section corners (Wagn. Stat., 1312, § 31) is not in conflict with the laws and regulations of the United States on the same subject. In either case the interior section corners are established, when the original corners cannot be found, at a point equi-distant from the corresponding corners of the section.
2. *Surveys—Lost corners—§ 32 of survey law.—Semble,* that § 32 of the survey law of Missouri (Wagn. Stat., 1312) providing the mode for re-establishing lost section corners is not in conflict with the laws of the United States or rules of the Land Office on the same subject.

Appeal from Carroll Circuit Court.

L. H. Waters, for Appellants.

I. The statutory method of re-establishing lost corners or interior lines is in conflict with the acts of Congress and the rules and regulations prescribed by the General Land Office. (Gen. Stat., ch. 27, §§ 24, 25, 32; Act of May 18, 1796, Land Laws, Vol. 1, p. 50, §§ 1, 2; Act March 26, 1804, 1 Land Law, p. 104; Act Feb'y 11, 1805, 1 Land Law, p. 119; Act April 29, 1816, 1 Land Law, p. 278; Campbell vs. Clark, 8 Mo., 553; Colvin vs. Fell, 40 Ill., 418.

II. East and west interior lines had nothing to do with the establishment of the original corners. The corners were placed upon north and south lines which were required to be run parallel with the eastern boundary of the township. The statutory method entirely ignores the mode adopted by the government for the sub-division of the township. In the absence of the monuments, the corners should be re-established by reference to the field-notes and plats, and by going over the work. In theory the original lines are deemed to have been correctly run, and a re-survey, if correctly made, will, it is to be presumed, lead to the same results. (Colvin vs. Fell, 40 Ill., 418.)

Ray & Day, for Respondent.

VORIES, Judge, delivered the opinion of the court.

This is an action of ejectment, brought by the plaintiff to recover the possession of a strip of land containing eleven acres, off from the north side of the north east quarter of the south east quarter of section number twenty-one, in township number fifty-three, in range twenty-one, situate in Carroll county, Missouri.

The petition was in the usual form. The answer put in issue the facts stated therein.

On the trial, owing to rulings of the court which were adverse to the plaintiffs' right to recover, he took a non-suit with leave to move to set the same aside. This motion was afterwards made and overruled by the court, and plaintiff excepted and has appealed to this court.

In order to shorten and simplify the investigation of the case in this court the attorneys of the respective parties have filed an agreed statement of the case, which presents the only questions necessary to be passed on by this court, and is as follows:

"This was an action of ejectment brought to recover eleven acres off the north side of the north east quarter of the south east quarter of section 21, township 53, range 21.

"The cause was tried at the September term, 1870, of the Carroll Circuit Court before the judge of the said court and judgment rendered for the defendant.

"The plaintiff insists that lost section corners, or quarter section corners on interior lines, should be re-established under the acts of Congress, and the rules and regulations prescribed by the General Land Office, and that the statutory method is in conflict therewith.

"Said defendant insists that said corners should be re-established under sections 24, 25 and 32 of ch. 27, Gen. Stat., 1865 (Wagn. Stat., 1311–12), and that there is no conflict between the method therein prescribed and the plan insisted upon by plaintiff.

"It is agreed that if the plaintiffs' position is correct, the judgment should be reversed; if incorrect, it should be affirmed."

It was admitted on the trial that the plaintiffs were the owners of the north east quarter of the south east quarter of section twenty-one, in township fifty-three, and range twenty-one; and that the defendant was the owner of the south east quarter of the north east quarter of the same section. So that it will be seen that the controversy between the parties grew out of the question of the proper location of the east and west line dividing the north east and the south east quarters of said section twenty-one.

It is insisted by the plaintiff that the mode provided by our statute for ascertaining the proper lines and interior corners of the different quarters of a section of land where the original marks or corners have been lost, is in conflict with the laws and regulations of the United States on the same subject, and therefore such mode of surveying is illegal and void. And it is further assumed that in the present case such mode of surveying has the effect to take from the plaintiffs' tract of land and add to the defendant's a strip containing eleven acres, which of right, by the United States' surveys, belongs to the plaintiffs.

By the regulations adopted by the land department of the United States, it is provided, that "quarter section corners, both upon the north and south, and upon east and west lines are to be established at a point equi-distant from the corresponding section corners, except upon the lines closing on the north and west boundaries of the township, and in those situations the quarter section corners will always be established at precisely forty chains to the north or west (as the case may be) of the respective section corners from which those lines respectively start, by which procedure the excess or deficiency in the measurement will be thrown, according to law, on the extreme tier of quarter sections." (Lester's Land Laws and Regulations, p. 122; Manual of Surveying Instructions, p. 26; Keetly v. Truitt, 30 Ind. 306.)

In the case of Knight vs. Elliott, (57 Mo., 317) it was held by the court that if the 30th section of the statutes of this State concerning county surveyors (Wagn. Stat., 1312) should be construed to conflict with the regulations of the United States land department, in reference to the sub-division of, and establishment of lost corners for the different sub-divisions of fractional sections, said section would be, so far as it conflicted with the laws and regulations of the United States wholly void. In the opinion in that case it is said that in interior sections the quarter section corners are always established, where the original corners cannot be found or proved, at a point equi-distant from the corresponding corners of the section. Now as the land in controversy is a part of an interior section, the question is, does our statute prescribing the manner of establishing lost corners to the different quarters of an interior section, conflict with the laws and regulations of the United States on the same suject?

By section 31 of the statute of this State concerning surveyors (Wagn. Stat., 1312) it is provided as follows: "In establishing decayed or destroyed quarter section corners, it shall be required to ascertain the medium point on the line between the two adjacent section corners, and re-establish such decayed or destroyed corners at said medium point."

This method of re-establishing lost quarter section corners, prescribed by this statute, seems to be in exact conformity to the method prescribed by the regulations of the United States land department, as the same is hereinbefore set forth, in reference to the sub-dividing interior sections, and must therefore be held to be a legal and proper mode.

The 32nd section of the statute of this State concerning surveyors (Wagn. Stat., 1312) provides the mode for the re-establishment of lost section corners, and two of the witnesses in this case, who are practical surveyors, testify that the method prescribed by said section was practical, and the proper way to ascertain and re-establish corners of interior sections where the same have been obliterated or lost.

We know of no law of the United States, or rule prescribed by the Land Office Department that conflicts with said section, or that would produce a different result from that produced by following the statutory mode. Most certainly the attorneys for the plaintiffs have not referred us to any law or regulation in conflict with our statute above referred to.

The judgment will be affirmed. Judge Hough did not sit in the case; the other judges concur.

OSCAR F. DAVIS, Appellant, *vs.* HENRY A. FOX, MARTHA J. MASON and ADOLPHUS MASON, her husband, Respondents.

1. *Equity—Bill to set aside deed on ground of duress—What proof necessary to support petition.*—In suit to set aside a deed on the ground that it had been made under duress; *held*, 1st, that a verdict for defendant in the trial court would not be set aside unless the evidence clearly preponderated in favor of the plaintiff; 2d, that where plaintiff failed to assert his rights for a space of seven years, it would take an undoubted and conclusive case of duress to authorize a court of chancery to interfere.

Appeal from Nodaway Circuit Court.

Heren & Rea, for Appellant.

I. A party making a deed under duress can enter and avoid such deed against a *bona fide* purchaser. (Worcester vs. Eaton, 13 Mass, 371; Somes vs. Skinner, 16 Mass., 348; 11 Mass., 379; 2 Black. Com., p. 290; 3 Black Com., p. 173–5.)

Dawson & Edwards, for Respondents.

I. A contract procured by fraud, duress and violence is not absolutely void, but only voidable; because the person upon whom the fraud and duress was practiced may ratify and affirm the contract. (1 Pars. Cont., 395; 1 Poth. Oblig., 14; 1 Black's Com., Chitty's ed., 291; 2 Wash. Real Prop., 586; Deputy vs. Stapleford, 19 Cal., 302.)

II. The respondents, Mason and Mason, being *bona fide* purchasers for a valuable consideration without notice, are

not affected by the fraud or duress of their grantor. They hold the title purged of the original fraud or duress. (Jackson vs. Henry, 10 Johns., 184; Fletcher vs. Peck, 6 Cr., 133–135, (p. 87); Somes vs. Brewer, 2 Pick., 183; Bean vs. Smith, 2 Mason, 252; Dexter vs. Harris, *Id.*, 531; Anderson vs. Roberts, 18 Johns., 513; Deputy vs. Stapleford, *supra*; 1 Sto. Eq. Jur., §§ 434, 436.)

III. The appellant's silence for years after Fox had conveyed the land in controversy to the respondents, Mason and Mason, is as conclusive upon him as if he had been a party to the conveyance to them. (1 Sto. Eq. Jur., 385; Storr and Brooks vs. Barker, 6 Johns. Ch., 166; Wendell vs. VanRansselær, 1 Johns. Ch., 343.)

IV. The evidence in this case is not sufficient to establish duress *per minas*. (Dallam vs. Renshaw, 26 Mo., 533, 544.)

Vories, Judge, delivered the opinion of the court.

This action was brought in the Nodaway Circuit Court, on the fifth day of March, 1870. The object of the action was to set aside a deed executed by the plaintiff in the month of July, 1863, purporting to convey certain lands therein named from the plaintiff to the defendant, Fox; and also to set aside and make void a deed executed by said Fox, conveying the same land to defendant, Martha Mason, who was the wife of her co-defendant, Adolphus Mason, on the ground that said deed from plaintiff to said defendant, Fox, had been obtained from plaintiff by force and duress.

The amended petition filed in the case by plaintiff, and upon which the trial was had, is substantially as follows:

That the plaintiff, on the 8th day of July, 1863, was the owner in fee of about seventy-three acres of land in Nodaway county, which is particularly described in the petition; that the value of said tract at said time, was two thousand dollars; that on or about the 7th day of July, 1863, the defendant, Henry A. Fox, came to the plaintiff at Maryville, Missouri, and demanded a deed conveying to said Fox the said lands before referred to; that shortly afterwards, and during

the same day, one David Nelson came to plaintiff and informed him that he (Nelson) was instructed by defendant, Fox, to tell plaintiff that he, said Fox, intended to kill plaintiff, unless plaintiff deeded said land to Fox; that the next morning said Fox came to plaintiff and demanded that plaintiff should go to the court house and make and acknowledge a deed to said Fox for said land, and not to leave town until he did so; and that plaintiff was further ordered that when he got to the court house he should not open his mouth; that plaintiff afterwards told defendant, that if he would give up to plaintiff his deed which defendant had obtained from plaintiff, and give plaintiff his word and honor that he, defendant, would not molest plaintiff, and would let plaintiff pass out of the State, that plaintiff would give him one hundred dollars; that defendant replied to plaintiff, that nothing but the land or plaintiff's life would satisfy him, and that if plaintiff did not deed said defendant his land immediately, defendant would take his life.

The petition then, after referring to the troubled state of the country at the time in consequence of the civil war then existing, and to the fact that several of plaintiff's neighbors had just previous to that time been killed at their homes in plaintiff's neighborhood, proceeds to state that he was induced, through fear and terror caused by the threats of said defendant, Fox, to execute and deliver a deed conveying his said land to said Fox, for a mere nominal consideration fixed by said Fox, without the consent of the plaintiff; that the consideration so fixed was one old wagon, two mares, one mule colt and one set of harness of the value of one hundred and seventy-five dollars; that afterwards, on the 25th day of April, 1864, the defendant, Fox, conveyed said land to defendant, Martha J. Mason; that the said Martha and her husband, Adolphus Mason, had notice at the time of their purchase of the land, that the deed from plaintiff to Fox for said land was obtained by force and duress as aforesaid. The plaintiff therefore offers to bring into court to be repaid to said Fox the sum of $175, the alleged value of the property received

by him for said land, and prays the court to cancel and make void the deed from plaintiff to Fox, and also the deed from Fox to Martha J. Mason, and to re-invest the title to said land in the plaintiff, and for other relief, etc.

The answer of defendant, Fox, fully denies all of the material allegations in the petition, and states that he purchased the land named in the petition of plaintiff at his solicitation and request, and for a fair price freely and fairly agreed on between the parties, and which was freely agreed on and received by plaintiff, etc.

The defendants, Martha and Adolphus Mason, in their answer deny all of the allegations of the petition, and charge that they purchased the land of the defendant, Fox, for a fair and full consideration paid for the same by them, and without any notice of any claim or right in plaintiff to said land whatever, and that they, without any notice of plaintiff's claim, had made large and valuable improvements on said land, etc.

Replications were filed, putting in issue the affirmative allegations in the answers. After hearing the evidence in the cause upon the trial, the court found for the defendants, and rendered a judgment in their favor and against the plaintiff for costs.

The plaintiff in due time filed a motion for a re-hearing of the cause, setting forth as grounds for said motion, that the judgment was against the law and the evidence, and against the weight of the evidence. This motion being overruled by the court, the plaintiff excepted and appealed to this court.

There are two points presented to this court for consideration: 1st. Does the evidence in the case show such a state of facts as will authorize the court to find that the defendant, Fox, obtained the deed to the land in controversy from plaintiff, without the consent of the plaintiff, and by threatened violence as is charged in the petition; and therefore to declare said deed to be void. 2d. If the evidence in the case should be considered sufficient to warrant a cancellation of the deed from plaintiff to said Fox, can the court under the

law, cancel the deed from Fox to Mrs. Mason, unless the evidence should show that Mason purchased with notice of the defect in Fox's title, or that plaintiff still had some claim to the land, or, in other words, will the fact that the deed was obtained by duress, avoid a deed to an innocent purchaser for value of the land from the fraudulent vendee?

The first of these questions must be determined as a matter of fact to be found by the evidence in the case, and if it should be solved in favor of the defendants in the case, it would render the solution of the second question wholly unnecessary.

When we refer to the evidence given by the respective parties on the trial of the cause, we find it to be painfully conflicting and contradictory. The plaintiff, by his own testimony, fully sustains the allegations of the petition in reference to the violent threats and duress on the part of the defendant Fox. He details with a great deal of circumstance and particularity the manner in which he was induced by fear of personal injury, threatened by said Fox, to execute the deed for the land to Fox without any choice on his part, and against his will. Plaintiff also testified that there were about seventy-three acres of the land worth from $25 to $30 per acre, which was conveyed to Fox for a wagon, two mares, a mule colt and a set of harness, worth in the aggregate from one hundred and seventy-five to two hundred dollars. In fact, if the plaintiff's evidence was uncontradicted and should have full credence, his petition and the charge of duress made therein is fully made out and sustained. The plaintiff also introduced one Nelson as a witness, whose evidence in some of the most material particulars corroborated and sustained the evidence of the plaintiff. A number of other witnesses were introduced by plaintiff, whose evidence in some degree, although in most cases in a very slight degree, tended to sustain the plaintiff's theory of the case.

It may be here remarked, that at the time, and for some time before the time that plaintiff conveyed the land in question to Fox, there had been great commotion and excitement

in the neighborhood where the plaintiff resided, and only two or three miles from where defendant Fox resided; that the excitement grew out of the conduct of the partisans of the respective parties at the time engaged in a civil war in this country; that several of plaintiff's neighbors had been killed only a few days before the day on which plaintiff conveyed the land, which was the 9th day of July, 1863; that owing to the disturbed condition of the country as aforesaid, plaintiff and others in the same neighborhood were fixing to leave, and leaving not only that neighborhood, but the State of Missouri, in order to get themselves and families in a place of personal safety; that a great many of such persons designing to remove from the State, were selling or trying to sell their farms and other property that they could not remove with them; that the plaintiff with his family started from his place sixteen miles south of Maryville, on the morning of the 8th day of July, 1863, to remove to Nebraska; that on the night of the 8th of July, 1863, plaintiff stayed all night at Maryville, where on the morning of the 9th the deed in question was made.

The defendant was also examined as a witness in the cause, and testified in his own behalf. The defendant's testimony was in direct conflict with the testimony given by plaintiff. He testifies that he met with plaintiff on the 8th day of July, 1863, as he was traveling with his family on the road to Maryville; that the plaintiff of his own accord proposed to trade his land to said Fox, for his wagon, two mares and a colt and set of harness; that they failed to trade on the road, but that he came to Maryville that night, where he again saw plaintiff, and where and when they made a trade by which plaintiff conveyed to him the land in question for the wagon and other property named. The defendant also testified that the wagon, mares and other property given to plaintiff for said land were worth from three hundred and fifty to four hundred dollars, and that the land was not worth to exceed five dollars per acre. His evidence is clear and positive to the effect that he used no threats to obtain the deed to the

land; but that it was made by plaintiff as his own free will and choice for a consideration freely agreed on by plaintiff.

There was a great quantity of evidence in the case which had not much materiality in it. I will only notice the evidence of a few of the witnesses, which seem to be in conflict with the plaintiff's statement of the case or inconsistent with his evidence.

Sarah T. Weaver testified that she was well acquainted with plaintiff, resided near by him previous to the 8th day of July, 1863, at which time he started to remove to Nebraska; that plaintiff was at her house on the morning of the 8th of July, 1863, stopped there as he was moving; said he wanted to sell his farm. Witness told him she was not able to buy; did not know that he set any price per acre on his land, but he offered his place to witness for a horse, a wagon and one hundred dollars in money. The horse was afterwards sold for $125 and the wagon for about $30. Witness told plaintiff that she thought he was foolish for going away or leaving his farm; he replied that he would sell it so cheap he would make witness buy it; that he was bound to sell his farm, and would as soon let witness have it as any one of his neighbors.

Reuben P. Weaver, a son of Mrs. Sarah T. Weaver, was also examined as a witness, and fully corroborated the evidence of his mother in reference to the offer by plaintiff to sell his land on the morning that he started. Said witness further testified, that after plaintiff had offered to sell his land on the morning of the 8th day of July, a friend of his named Hawley called at the house of his mother; that he was informed of the price at which plaintiff had offered to sell his land; that said Hawley thought the land was cheap at the price; said he could raise the money; and that witness and Hawley followed on after the plaintiff to Maryville; got there on the morning of the 9th of July, with a view to purchase plaintiff's land, but found that plaintiff had sold the land to defendant Fox.

Perry Wright testified that he was acquainted with the wagon, mares and other property given by Fox to plaintiff for the land, and that it was worth in the aggregate about $450. Andrew Terhune, as well as several other witnesses, testified that they were acquainted with the price of land in the neighborhood, and that plaintiff's land, at the time of the sale to Fox, was not worth more than from five to six dollars per acre.

Matthew G. Roseberry, a witness for defendants, testified that he knew plaintiff and defendant, Fox, in July, 1863; that he resided at that time in Maryville, Nodaway County, Missouri; that he had a conversation with plaintiff in July, 1863, when he was in Maryville, on his way to Nebraska; that witness was at the time acting as provost marshal at Maryville, and that O. F. Davis or H. A. Fox spoke to him about a pass; was not sure which of the two spoke to him first. Witness had one or two conversations with plaintiff about his trade of his land to Fox. One of said conversations took place in the street in front of the court house, about the time the wagon and horses were delivered to plaintiff. Witness made some remark to plaintiff about selling his place, in which something was said about the consideration received for the land. Plaintiff remarked that he was not getting very much for his land, but that he would rather let Fox have it than any one else, because Fox had befriended him. Witness had another conversation with plaintiff where he was encamped; could not recollect whether it was before or after the conversation related. Witness went down to plaintiff's camp; wanted to know of plaintiff the facts about his leaving the country. Witness asked him why he was going away; he replied that he did not think he was safe where he lived. Witness told him that he was in no danger; he could stop at Maryville until the excitement was over, if he was afraid to stay down at his house on his farm. Witness told him he would better keep his place, it might be of use to him when he came back. Plaintiff replied that he would rather sell it, even if he did not get what it was worth;

that his farm would not be worth anything if it was left there; that he would rather have something than nothing; that the farm would go down and be worth nothing; that plaintiff then proceeded to state that he would rather sell the farm to Fox as he had befriended him; he did not appear to apprehend any danger where he then was; he only appeared to be afraid to stay down where his farm was. This witness also testified that plaintiff's land was not then worth more than five dollars per acre; and that he was acquainted with the price of land at the time.

William H. Davis, another witness, stated that he resided in Maryville, Nodaway county, on the 8th and 9th days of July, 1863; that he was acquainted with plaintiff and defendant, Fox, at and before said time; that he was keeping hotel in Maryville; that he saw plaintiff in Maryville when he was there on his way to Nebraska; it was shortly after the 4th of July, 1863; that he had a conversation with plaintiff early in the next morning after he got to Maryville with his family, and learned from him that he had made a bargain with Mr. Fox; witness thinks that no writings had then been executed. Witness asked plaintiff if he did not think he had made a bad bargain in selling his property at the price he had. He said that he did not know he had under the circumstances; that he could take the wagon and team that he got from Fox and buy a farm worth more than his. Witness asked him what farm it was; he said it was the old Hauseman farm the first one beyond Breckenridge's place. Witness further testified that plaintiff talked freely with him; that the talk was in presence of plaintiff's family where they were encamped; that plaintiff and his family told witness all about their reasons for leaving the country, etc.

There was a mass of other evidence in the case, some of which tended to prove that the wagon, team and other property received of Fox for the land, was worth from four hundred to four hundred and fifty dollars, and that plaintiff had offered his farm to other persons for three hundred dollars in cash; but it would serve no useful purpose to repeat or further refer to the other evidence in the case.

The evidence on the question of duress is certainly conflicting, and where the evidence to establish a certain fact, or to destroy the presumption of or existence of such fact, is conflicting and irreconcilable as it certainly is in this case, the court must, if possible, decide in accordance with the preponderance of the evidence. The Circuit Court has decided this case for the defendant; and if it was decided on the ground alone that the evidence, when all taken together, did not make out a case of duress as is charged in the petition, or that the evidence preponderates in favor of the defendants, this court would not under the evidence in the case feel justified in reversing the judgment; for there is certainly much evidence in the case which is wholly inconsistent with the idea that plaintiff was forced by Fox to make the deed. In such case we would not reverse the judgment rendered by the trial court, merely on the evidence in the case, unless the evidence very clearly preponderates against the finding of the court. This we cannot say is so in reference to the case under consideration.

It may be further remarked, that where in a case like this, a party fails to assert his rights for a space of seven years, and fails for said time to offer to return the consideration received for the land, it would take a very strong, undoubted and conclusive case of duress to authorize a court of chancery to interfere.

With the foregoing view of this case it is rendered wholly unnecessary that we should notice the second point made by the parties in this court. The judgment of the Circuit Court will be affirmed; the other judges concur, except Judge Hough, who did not sit in the case.

STATE OF MISSOURI, Respondent, *vs.* WILLIAM E. HUDSON, Appellant.

1. *Criminal law—Murder in the second degree, what constitutes—Constr. Stat.*—Under the statute (Wagn. Stat., 446, § 2) where a homicide is intentional but does not amount to murder in the first degree, nor come within any of the grades of manslaughter, or justifiable or excusable homicide, it is murder in the second degree.
2. *Practice, criminal—Homicide, different grades of—Instructions as to.*—It is the established law of this State that where, under the indictment, the accused may be convicted of murder in any particular degree, or of any of the lesser grades of homicide, if the evidence will warrant it, the court may in its discretion direct the jury, by suitable instructions, that the case as made by the evidence is of a particular degree and will not justify a conviction for another or different one.
3. *Instruction—Evidence, etc.*—An instruction not warranted by the evidence should not be given.
4. *Homicide—Affray brought on by prisoner—Plea of self defense unavailing.*—Where one commits a homicide in an affray brought on by himself, he cannot justify by showing that at the particular moment when the deed was committed he was acting on the defensive.

Appeal from Holt Circuit Court.

Thomas H. Parrish, with Bennett & Vinton, Pike, for Appellant.

I. Instruction 10 is without precedent. It assumes that the evidence proves the defendant guilty of murder, requiring the jury to find the degree only. (State vs. Smith, 53 Mo., 267; State vs. Hundley, 46 Mo., 415, 421-2; Schneer vs. Lemp, 17 Mo., 142; Fine vs. St. L. P. S. 30 Mo., 166; State vs. Cushing, 29 Mo., 215; Scroggin vs. Wilson, 13 Mo., 80; Labeaume vs. Dodier, 1 Mo. 618; Glasgow vs. Copeland, 8 Mo., 268; State vs. Packwood, 26 Mo., 363; Chappell vs. Allen, 38 Mo., 213; State vs. Ostrander, 30 Mo., 12.)

James Limbird, Pros. Atty. Holt Co., for Respondent, relied upon State vs. Schoenwald, 31 Mo., 147; State vs. Starr, 38 Mo., 270.

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted for murder in the first degree in killing one William Dougherty, and his trial resulted in

conviction for murder in the second degree and he was sentenced to imprisonment in the penitentiary.

The evidence is brief and there is no conflict in it. It seems that a man by the name of Scott and the deceased were sitting upon a fence, and the defendant came out of a saloon and approached them. Scott then had some words with the defendant and told him that he was going to make a son of the deceased whip him when he got well. At this the defendant declared that "none of the d——d set" could do it. That he could whip any of them. The deceased then got off from the fence and told the defendant that he must not say that for he could not whip him.

Defendant then went down the sidewalk a short distance and had his knife opened and came back with it in his right hand, either in his pocket or holding it behind him. He then told the deceased that he had nothing against him, but if he wanted "to take it up to pitch in," or words to that effect, and threw out his left hand towards the face of the deceased. The deceased then gave him a blow that staggered him, and followed it with another that knocked him to his knees. He then raised himself and stabbed deceased in the heart, from the effects of which wound deceased expired in two or three minutes. There was also evidence of express malice and that the act was committed to gratify a previous grudge.

This was the evidence sworn to by many witnesses who witnessed the whole difficulty.

The defendant introduced no evidence on his part.

The court of its own instance gave ten instructions, all of which were objected to by defendant.

The first instruction was a mere abstraction—unnecessary—but it could do no harm. It simply told the jury that they should find their verdict according to the directions of the court and the evidence in the case.

The second instruction informed the jury that they were the judges of the evidence and the credibility of witnesses, and might give to the testimony such weight as they might deem it was entitled to. This was also unnecessary, as no

attempt was made to draw the testimony of any witness in question; but as all the evidence was given on the part of the State, its only effect was to weaken the case for the prosecution—and it was therefore favorable to the defendant.

The third merely states that the defendant is charged with killing Dougherty; and the fourth declares that the burden of proof is upon the State to prove the charge in the indictment, and that the defendant is presumed to be innocent until his guilt is proved beyond a reasonable doubt.

The fifth, seventh, eighth and ninth instructions related solely to murder in the first degree, and what was necessary to prove, to convict of that offense. They were unobjectionable and followed the law as laid down in repeated decisions of this court; but as the defendant was not convicted of murder in the first degree, to which they were only applicable, it is needless to bestow upon them any consideration.

The sixth instruction was that if the jury believed from the evidence, that the defendant did not conceive and entertain the design or intention to kill the deceased until the moment or instant of the killing; that is, if they believed that the killing was not thought of and determined upon until the fatal stroke was given, and that the defendant, at the time of giving the blow, intended to kill the deceased and did kill him, then they should find him guilty of murder in the second degree.

The statute, after defining what constitutes murder in the first degree says "all other kinds of murder at common law, not herein declared to be manslaughter, or justifiable or excusable homicide, shall be deemed murder in the second degree" (Wagn. Stat., 446, § 2). Under this statute where the killing is intentional, and does not amount to murder in the first degree, nor come within any of the grades of manslaughter or justifiable or excusable homicide, it is murder in the second degree. Such was the construction placed upon it, in the case of the State vs. Joeckel (44 Mo., 234) and approved in State vs. Saunders (53 Mo., 234) and the instruction here given substantially embodies this view.

The tenth instruction confines the jury in their verdict to either murder in the first or second degree, and in this there was no error. The evidence clearly shows that it was either one or the other. It is the established law in this State, that where, under the indictment, the accused may be convicted of murder in a particular degree, or of any of the less grades of homicide, where the evidence will warrant it, the court may, in its discretion, direct the jury by suitable instructions, that the case, as made by the evidence, is of a particular degree and will not justify a conviction for another or different one. (State vs. Schoenwald, 31 Mo., 147, per Scott, J.; State vs. Starr, 38 Mo. 270.)

We have therefore found nothing in the instructions of the court, which would warrant a disturbance of the judgment.

The defendant asked for seven instructions, and the court refused to give the second, third and fourth.

The second was to the effect that if defendant stabbed the deceased with a knife, but without any justification therefor, as explained by the court, but stabbed and killed him with a dangerous weapon in the heat of passion, induced by sufficient provocation, that is, by violence to his person, without a design to effect death, then the killing would be manslaughter in the third degree. This instruction was rightfully refused, because it was at variance with the evidence in the case. The defendant coolly brought on the whole difficulty. He left the company deliberately and went away in order to open his knife for ready use; he then came back with it in his right hand ready for use, and commenced the assault with his left hand; as soon as the deceased made the demonstration which was doubtless anticipated, he used his weapon with deadly effect. Under such circumstances he could not plead in mitigation of his own wrong.

The third and fourth instructions have reference to the law of self-defense, but as the defendant was the aggressor and brought on the difficulty, such a defense was not available.

The facts in the case are few and simple, and the instructions given by the court covered the whole case; and when

taken in connection with those given at the request of the defendant, were as favorable to him as the law would permit. His trial was fair, and we cannot interfere with the judgment.

The judgment is affirmed, the other judges concur.

FRED. W. HENSHAW Appellant, *vs.* EDWARD DUTTON, Respondent.

1. *Note—Fraud as defense to.*—Where a note is procured by fraud, that fact may be set up in defense.
2. *Note given on contingencies—Failure of.*—Where a note is given on contingencies not therein expressed, the failure of such contingencies cannot be set up as a defense.
3. *Note given to payee as escrow.*—A note cannot be given to the payee as an escrow. The delivery must be to a third person.
4. *Note—Parol evidence as to.*—Parol evidence is not admissible to vary the meaning of a note.

Appeal from Buchanan Circuit Court.

Ensworth, Hill & Carter, for Appellant.

B. R. Vineyard, with A. H. Vories, for Respondent.

NAPTON, Judge, delivered the opinion of the court.

This suit was upon a note for $1,200. The answer admitted the execution of the note, but set up as a defense that there was no consideration for it; and proceeded to state the following facts to show this want of consideration, to-wit: that plaintiff and defendant were partners in certain manufacturing machinery and as such partners were indebted to Beattie & Co., on a note for about $3,000; and that the note sued on was given on condition that if Beattie & Co. would release the plaintiff from the payment of said note, he, plaintiff, would sell and deliver to defendant all his plaintiff's interest in said partnership property—to which defendant consented; that under such understanding and agreement said

note was executed, but was to be delivered to plaintiff upon said Beattie & Co. releasing said plaintiff from said note. And the defendant charges the fact to be that said Beattie & Co. refused to release plaintiff from his liability on said note, and that said agreement "fell through" and that the note sued on, by some means unknown to defendant and without his consent, came into the hands of plaintiff.

The plea further states, that defendant never received any consideration for said note, nor was said plaintiff's interest in said partnership property turned over to defendant, as by said agreement it should have been done; that, therefore, said note is wholly without consideration and void, and never was delivered with consent of defendant.

The plaintiff moved to strike out that part of defendant's answer which related to the note due by plaintiff and defendant to Beattie & Co.

It seems from the record that there was a mis-trial upon the issue, and on the calling of the case subsequently, the plaintiff insisted on taking up the motion to strike out parts of the answer; but the court refused to consider the motion and ordered the cause to be tried on the pleadings. On this second trial, the plaintiff read the note and the defendant then proceeded to introduce evidence.

The substance of the evidence is, that plaintiff and defendant were equal partners in some machinery in a woolen manufactory; that they owed Beattie & Co. about $3,000; that a proposal was made for one or the other to sell out his interest, and that defendant offered $1,200 for plaintiff's interest. The defendant signed a note and a deed of trust to secure it. This was for $1,200, the assumed value of plaintiff's interest in the mill. The defendant was to pay all debts of the concern, and among others he was to get Beattie & Co. to release plaintiff on the note for $3,000 due by the firm. Beattie at first agreed to this, but ultimately declined to release Henshaw, the plaintiff.

It seems that Henshaw had a policy on his interest in this property. After the note and deed of trust were signed and

delivered to the plaintiff, it was proposed to go over to the Insurance Company's office and have this policy assigned to defendant. This was done, and the assignment was entered on the books of the Insurance Company, and the policy delivered to defendant. After Beattie & Co. declined to discharge plaintiff, defendant asked plaintiff to give up the note; but this was not done.

Defendant was in possession of the property at the time of this arrangement, and the plaintiff never meddled with it afterwards. He never had any control over it or came round where it was. The property was in defendant's house. The defendant agreed to pay all the debts, and the defendant agreed to keep up the policy of insurance. This is the substance of the evidence of defendant himself, except that he states that the agreement was to be relinquished on the release of Beattie & Co. to Henshaw. The defendant stated that this release was a condition of the note.

There is no evidence of any fraud in procuring the possession of the note or mortgage; and the testimony of the persons present at the transaction shows that there was no fraud or misunderstanding in relation to this.

The instructions asked by plaintiff were all refused; but the instructions asked by defendant were given, of which the first is as follows: 1st. "If the jury believe from the evidence, that plaintiff and defendant were partners in a woolen mill and machinery, and that as such partners, they were indebted to Beattie & Co. in the sum of $2,500 or $3,000, and that the defendant agreed to purchase the interest of plaintiff in said partnership effects for $1,200, on condition that Beattie & Co. would release the plaintiff from paying his part of said debt, and that to carry out said contract, the defendant signed the note and mortgage referred to, and left the same in the hands of plaintiff to await the said release from said Beattie and the transfer of said property to defendant, but with no intention to deliver said note and mortgage to plaintiff, as the obligation of defendant until said conditions were complied with, and if they further believe from

the evidence that Beattie refused to release plaintiff from said debt, and that plaintiff never transferred his interest in said mill and machinery to defendant, and that defendant made no claim to the same under said agreement, but demanded his note and mortgage from plaintiff at said time, who refused to deliver them up to defendant, then the jury will find for defendant."

It is unnecessary to recite the other instructions, since they are substantially to the same effect. The plaintiff took a non-suit with leave to move, etc., and the motion to set aside the non-suit was overruled, and upon exceptions to this decision the case is brought here.

We do not see why the court refused to consider the motion to strike out, when the case was called on the second trial.

It is difficult to see why the refusal of Beattie & Co. to discharge plaintiff should afford any ground of defense against the note and mortgage. The defendant admitting himself to be a partner of plaintiff, on buying out the interest of plaintiff, would, of course, be responsible for all the debts of the partnership. The release of his co-partner would only add to his liability, and if the partner was consenting to this release and subsequently waived that consent, we cannot see how the defendant was injured. The whole arrangement, as stated in the plea and attempted to be proved is for the benefit of Henshaw, and he declines the proposed benefit as stated in the plea and proved on the trial. But why should Dutton, the defendant, complain of this? Beattie & Co.'s refusal to release Henshaw was an advantage to defendant—certainly no disadvantage—for the firm and its stock were responsible for this debt; and a release of one of them would not only diminish the security, but would make Dutton responsible for the whole debt.

This part of the defendant's answer is no defense and should have been stricken out. But the answer goes further and claims that the consideration has failed, and that the note was without consideration. The proof is, that the defendant

was in possession of the whole property conveyed or agreed to be conveyed; that the plaintiff owned one-half interest in it; upon which he had an insurance policy; that he transferred this policy to defendant, not only on the books of the company, but by handing over to him the policy.

If a note is procured by fraud there is no doubt such defense is available. If it is given upon contingencies not expressed in it, the failure of such contingencies cannot be set up as defense to the note. It cannot be given to the obligee as an escrow. Such delivery must be made to a third person, not the obligee. Parol evidence is not admissible to vary the meaning of a note.

These principles are so well settled as to need no authorities to support them. The instruction given by the court ignores all these principles.

Whether wrong instructions given will justify a party in taking a non-suit and moving to set it aside on this ground, is a question upon which doubts might be expressed; but as no point is made on this, we will reverse the judgment and remand the case.

Judge Vories not sitting; the other judges concur.

JOHN S. MILLER Defendant in Error, *vs.* WM. H. FOLMSBEE, *et al.*, Plaintiffs in Error.

1. *Practice, Supreme Court—Failure to assign errors, etc.*—Where appellant neglects to file assignment of errors or statement and brief, appeal will be dismissed.

Error to Davies Circuit Court.

WAGNER, Judge, delivered the opinion of the court.

In this case the plaintiffs in error have neglected to file any assignment of errors, or statement and brief, as the law requires.

The writ will therefore be dismissed; the other judges concurring.

AARON HALL, Respondent, *vs.* ALBERT C. ADKINS, Appellant.

1. *Larceny—Taking away of property by one in lawful possession at the time.*—Where one is lawfully in possession of land on which a crop of corn is grown, and by the terms of his lease is to gather the corn and garner it as security for payment of the rent, the taking away of the corn by the lessee and appropriation thereof to his own use, is simply a breach of trust, and not larceny. That offense cannot be committed in respect to property at the time in the lawful possession of the accused. In every larceny there must be a trespass.
2. *Larceny—Intent must be determined by jury.*—The intent with which property is taken is a question for the jury.
3. *Slander, action for—Words charged, accompanied by statement of circumstances, etc.*—The words, "A. B. is stealing my corn," are in themselves actionable as slanderous, and malice will be presumed without proof. But where it appeared that the speaker honestly believed that the circumstances attending the taking of the corn constituted larceny, and without malice uttered the words only to those to whom he communicated the facts in his opinion constituting the larceny, he will not be held liable for slander.

Appeal from Andrew Circuit Court.

Heren & Strong, for Appellant.

I. The intent with which property is taken is always a question for the jury. (Thatch. Crim. Cas., 480, 484; State vs. Williams, 35 Mo., 229.) In this case whether the removal of the corn by respondent was a trespass or larceny, depends on the circumstances of the taking and intent with which it was done, and certainly from the evidence in this case, was a question for the jury to pass on.

II. The appellant admits the speaking of the words as charged, but denies their falsity or malice, and pleads the facts, circumstances and occasion under which the words were spoken, in order to justify the speaking. And where the occasion and circumstances seem to justify the charge, a malicious intent is not presumed; and malice in fact is essential to the right of action. (Pasley vs. Kemp, 22 Mo., 412; Weaver v. Hendrick, 30 Mo., 502; Atterbury vs. Powell, 29 Mo., 433.)

Allen H. Vories, for Respondent.

I. The words charged in the petition are actionable *per se*.

II. Plaintiff could not have been guilty of larceny, as he could not steal his own corn.

III. The principle of the law, as declared in the case of Pasley vs. Kemp, (22 Mo., 411, 412) has no application. For two of plaintiff's witnesses prove that the charge of stealing was made without any explanation or any statement.

Hough, Judge, delivered the opinion of the court.

This was an action for slander. The defamatory words charged to have been spoken by the defendant of the plaintiff, were: "He is stealing my corn; Aaron Hall, (plaintiff meaning) stole my corn and is swindling me, and the neighbors are helping him do it."

The defendant admitted in his answer the speaking of the words charged; denied that the same were maliciously spoken; and pleaded in justification the truth of the words spoken, and in mitigation of damages, the facts and circumstances relied upon to constitute said stealing, and a reference by him to such facts and circumstances at the time of speaking the words.

The plaintiff replied, denying the facts relied upon to constitute the larceny charged; and averred that no explanation was made by defendant of the words charged at the time they were spoken; and that no reference was made by defendant to the facts and circumstances relied upon by him to constitute the larceny charged.

It appears from the testimony that the defendant leased to the plaintiff and one John Hall, jointly, a tract of land in Andrew county, from the 3d day of August, 1871, to the 1st day of March, 1873, on which a crop of corn was to be grown by the plaintiff and John Hall, they, in addition to other stipulations on their part, agreeing to pay defendant, on or before January, 1st, 1873, or before, if the crop was sooner sold, $175 in money for the use of the land and other benefits conferred by the lease, "the crop to be security for the payment of said sum, and to be gathered and penned on the premises on or before December, 1st, 1872."

It further appears, that the plaintiff and defendant had an interview, in which plaintiff proposed to provide other security for the rent, so that he might dispose of the corn, but failed to do so; and afterwards told several parties that he and defendant had had a "fuss," and that he intended to take the corn, and if they saw him taking it to say nothing about it. Before any of the rent was paid a portion of the corn was taken away in the night, without the consent, and against the will of defendant, and used to feed plaintiff's hogs. Plaintiff explained why it was taken in the night; but it is unnecessary to state the explanation here.

The testimony was conflicting as to whether the defendant at the time of speaking the actionable words, communicated to every person to whom and in whose presence he used them, the circumstances attending the taking of the corn by plaintiff.

At the instance of the plaintiff the court gave six instructions, to the giving of which defendant excepted. All of them seem to be unobjectionable, save the 4th, which is as follows: "That there is no evidence before the jury to sustain the defendant's plea of justification in this cause, and at all events their verdict must be in favor of the plaintiff, for such damages as they believe from all the evidence and circumstances in the case the plaintiff has sustained, not to exceed the sum of five thousand dollars."

Nine instructions were asked by the defendant, the 3rd, 6th, 7th, 8th and 9th of which were refused; and defendant excepted. The 3rd instruction simply asserted that the defendant had a special property in the corn, which the court amended by adding in substance, that the property in said corn was in plaintiff and his partner, subject to defendant's claim for rent, and in that shape gave it to the jury. Defendant's 6th and 8th instructions recited the main facts in evidence in regard to the taking and use of the corn and the terms of the lease, and declared the removal and conversion of said corn, if made with the intent to deprive the defendant of his security for the rent or any part thereof, to be lar-

ceny. The 9th instruction is as follows: "If the jury believe from the evidence, that plaintiff and John Hall, by a written contract, had rented land of defendant, and by such written agreement the crop was to be penned on said rented premises and remain a lien for the rent, and that the plaintiff, without the knowledge or consent of the defendant, was secretly hauling off and disposing of said corn, and that the defendant discovered said plaintiff hauling off said corn, and at the time of making such discovery charged and accused the plaintiff with stealing the same, to his face, and gave the circumstances and made the same accusation against the plaintiff, to and in the presence of other persons, giving the circumstances and referring to the same transactions, the plaintiff is not entitled to recover in this action, unless the jury believe from the evidence that the defendant spoke said words with malice, with intent to injure and defame the plaintiff, and not with an honest purpose, believing the words spoken true, and that he had a right to speak said words."

There was a verdict and judgment for the plaintiff, and the case comes here by appeal.

In every larceny there must be a trespass. In this case the plaintiff was lawfully in possession of the land on which the corn was grown; and by the terms of the lease, was to gather and place it in a pen by December 1st, 1872. The lease evidently contemplated a sale of it by the plaintiff to realize money to pay the rent. The corn was his and in his possession and not simply in his custody. There could be no taking from himself. A man may be guilty of larceny in stealing his own property, when done with intent to charge another person with the value of it; but it must be taken from the possession of another. (10 Wend., 165.)

The defendant had a statutory and contract lien, but the diversion by the plaintiff of a portion of the corn from the purpose to which he had agreed to apply it, though a wrongful act, was simply a breach of trust which could not render him criminally liable. It constituted no larceny. To this extent the 4th instruction asked by plaintiff was proper; but

it went further and required the jury to find for the plaintiff, regardless of other facts in the case, which if found by them to exist would have constituted a justification and entitled the defendant to a verdict. These facts, it is true, were pleaded in mitigation only; but the defendant was entitled to their benefit when proven, even though he made an improper application of them in his answer.

The defendant testified, that on every occasion on which he charged the plaintiff with stealing his corn, he stated the circumstances under which it was taken, and referred such charge thereto. This was denied by two of plaintiff's witnesses. Whether he did or not was a question which should have been submitted to the jury.

The words spoken being in themselves actionable, no proof of malice was necessary. The law implied it. But if the defendant honestly believed that the facts and circumstances attending the taking of the corn constituted larceny, and so believing, and without malice, uttered the words charged only to those to whom he communicated the facts in his opinion constituting the crime charged and upon which he based the same, thus sending an antidote along with the poison, and showing a mistaken view of the law, rather than a malicious purpose, the plaintiff cannot recover. (Pasley v. Kemp, 22 Mo., 407.)

From these observations it will be seen that the court erred in giving the 4th instruction for the plaintiff, and in refusing to give the 9th instruction for defendant. The 6th and 8th instructions asked by defendant were properly refused. The 7th instruction, and the modification of the 3d instruction, need not be noticed.

The judgment is reversed and the cause remanded; all the judges concur.

STATE OF MISSOURI, Appellant, *vs.* HENRY C. CLARKSON, Respondent.

1. *Indictment—Appeal of State—Failure to recognize or commit defendant—Effect of.*—Where the State appeals from a judgment quashing an indictment, it is the duty of the court, in which the cause is pending, either to recognize the defendant for his future appearance or commit him in the same manner as if he were appellant (Wagn. Stat., 1114, § 15). But if the court neglects this requirement, the proceeding will not for that reason be dismissed. The only result will be that the prosecutor will be put to the trouble and expense of procuring the re-arrest of the defendant if he can be found.

2. *Indictment against County Treasurer for converting fund for payment of interest on railroad township bonds—What averments sufficient—Constr. Stat.*—An indictment brought under the statute of 1870 (Ad. Sess. Acts 1870, pp. 29, 30; Wagn. Stat., 459–60, § 41) against a County Treasurer, for converting, to his own use, the fund for payment of interest on railroad bonds issued by a township, need not allege in what manner the conversion was effected. But where the indictment charges the officer with using the fund "by way of investment" etc., these particular acts must be set out.

And the indictment is not bad, because it charges that the money converted was township property. Although the township could not make independent contracts and be bound in its separate capacity, it was nevertheless a legal sub-division of the county, an organization for certain municipal purposes; the subscriptions were essentially township subscriptions, and the bonds township bonds; and the money was raised from taxes on township property. The County Court was nothing more than an agent for the township, to carry out the law.

Appeal from Linn Circuit Court.

C. Boardman, with John A. Hockaday, Att'y Gen'l, for Appellant.

I. The court erred in quashing the first count in the indictment, the offense being charged in the language of the statute (Wagn. Stat., 459, 460, § 41), and a statutory offense, it is not necessary to state the manner or means of the alleged conversion. (Whart. Am. Crim. Law, 3d Ed., ch. 5, pp. 185–6; State vs. Mitchell, 6 Mo., 147; Spratt vs. State, 8 Mo., 247; State vs. Fulton, 19 Mo., 680; State vs. Cox, 29 Mo., 475.)

II. If the funds were for the purpose of paying the interest on the railroad bonds of Jefferson Township, they were properly designated in the 2nd count as the property of said township. (State vs. Cunningham, 51 Mo., 479.) As to

the right of the township to subscribe stock to railroads (Wagn. Stat., pp. 313–15). Notice of the prosecution of this appeal has been given him.

Geo. W. Easley, with Alex. W. Mullins, for Respondent.

I. This appeal should be dismissed because the defendant was not either committed or recognized by the court below. (Wagn. Stat., 1114, § 15.) This court cannot acquire jurisdiction over the person of the defendant, nor can he have notice of the appeal otherwise than by such commitment or recognizance.

There is no machinery provided for the re-arrest; while the State does make provision for re-arrest in case the defendant forfeits his recognizance. (Wagn. Stat., 1115, § 23.) The law did not intend that in case of appeal by the State, and reversal, it should take the risk of his escape.

II. The indictment must charge the manner and means of conversion.

III. The indictment should be quashed because it charges the money to be the property of a municipal township. Under the statute the funds collected for the payment of interest, would be the property either of the county of Linn or of the bond holder, and could not belong to the township because it had no separate existence.

WAGNER, Judge, delivered the opinion of the court.

This was an indictment under the statute (Wagn. Stat., 459, § 41, Ed. 1872) for embezzlement, against the defendant who was Treasurer of Linn county.

The indictment contained two counts. The first count set out the election and qualification of the defendant, as Treasurer, and alleged that, as such Treasurer, he was charged with the safe keeping, transfer and disbursement of the public moneys of the county; and while being such, he unlawfully, corruptly, wilfully, knowingly and feloniously did convert to his own use, a portion of the public moneys received by him as Treasurer for safe keeping, transfer and disbursement.

The second count charged that the defendant as Treasurer had the safe keeping, disbursement and transfer of the ordinary funds for the payment of the interest on the railroad bonds of Jefferson township, in the said county; and that as such Treasurer it was made his duty to safely keep and disburse the public money of the county including the fund for the payment of interest on the railroad bonds, and while being such Treasurer, he did unlawfully, wilfully, knowingly, corruptly and feloniously convert to his own use, a portion of the fund for the payment of said interest, the same being the property of said Jefferson township.

A motion was made to quash both counts of the indictment. In reference to the first count, the reasons assigned were: First, that the offense attempted to be charged was not in the language of the statute; and, Secondly, that the count did not set out the manner or means of the alleged conversion. The same grounds were alleged against the second count, and an additional reason was assigned against its validity, namely, that the property alleged to have been converted, was charged as being the property of Jefferson township, a body that had no authority, under the law, to own or hold property.

The motion to quash was sustained and the State appealed.

It seems that when the motion to quash was sustained, and the State took its appeal, the court did not recognize the defendant to appear upon the final determination of the cause in this court, nor did it commit him; and a motion is now made to dismiss the appeal for that reason.

The statute, after giving the State the right to appeal in such cases, provides that if an appeal be granted, the court below shall order the defendant to be committed or recognized, and the recognizance shall be to the same effect as the recognizance required where the defendant himself is appellant; and the party, if committed, shall be held in custody until the judgment of the Supreme Court shall have been passed on the case, to abide such judgment. (Wagn. Stat., 1114, § 15.)

Where the State appeals from a judgment quashing an indictment, it is the duty of the court in which the cause is pending, to either recognize the defendant for his future appearance, or commit him in the same manner as if he were the appellant. But if the court neglects or omits this plain statutory requirement, it does not thence follow that the State is to be deprived of the benefit of prosecuting its appeal. The only effect is that, upon a reversal, the prosecutor would be put to the trouble and expense of procuring the re-arrest of the defendant, if he could be found, when, if the court had pursued its line of duty and followed the law, he would have been already apprehended, or recognized to appear.

The motion to dismiss must therefore be overruled.

The section of the statute upon which the indictment was drawn, was adopted in 1870, and is as follows: "If any officer, appointed or elected by virtue of the constitution of this State, or any law thereof, including as well all officers, agents and servants of incorporated cities and towns, as of the State and counties thereof, shall convert to his own use in any way whatever, or shall use by way of investment in any kind of property or merchandise, or shall make way with, or secrete, any portion of the public moneys, or any valuable security by him received for safe keeping, disbursement, transfer, or for any other purpose, or which may be in his possession, or over which he may have the supervision, care or control, by virtue of his office, agency or service, every such officer, agent or servant, shall, upon conviction, be punished by imprisonment in the penitentiary not less than five years."

It will be observed that the first clause of this section describes the ordinary elements of the offense of embezzlement. Then follow certain alternative provisions which, being committed, may constitute that crime. The section applies the law to a new class of persons, and declares that if they convert to their own use, in any manner whatever, the moneys or securities there spoken of they shall be guilty. When they have made the illegal or unlawful conversion, the elements of the offense are complete, no matter by what means they have

accomplished the object. Thus far the offense is like the previous statutory regulations in regard to embezzlement. But a further and distinct ingredient is introduced. If the officer, agent or servant having the supervision, care or control of the money or security shall use the same by way of investment in any kind of property or merchandise, or shall make way with or secrete the same, he is also made guilty of the offense. An indictment therefore may be predicated on either of these provisions.

Where there is criminal conversion which would constitute ordinary embezzlement, it is not necessary to allege in what manner that conversion was affected. But if the indictment is drawn on the latter clause of the section, then it must be stated that the conversion took place in the manner pointed out in the statute, that is, by way of investment in property or merchandise, etc. This clause is not connected with the prior part of the section. It transfers into a felony what was previously a cause for a civil action. The manifest conclusion is, that the court erred in quashing the first count.

Nor is the action of the court sustainable in quashing the second count. It is true that the township had no power to make independent contracts and be bound in a separate capacity; but it was nevertheless a legal sub-division of the county —an organization for certain municipal purposes. The law under which the indebtedness accrued, for which the money was paid, to satisfy the township interest on its subscription to stock, was not a county liability. The name of the county was made use of as a medium; but the township was exclusively required to provide for the payment of the interest and principal. The subscriptions were essentially township subscriptions, and the bonds issued were township bonds to all intents and purposes, and the County Courts were merely made use of as agencies to effectuate and carry out the objects of the law. (State, etc., vs. Linn County Court, 44 Mo., 504.)

The money, it is alleged, came into the hands of the defendant to pay the interest on the township bonds; it was

raised from taxes assessed on township property; and it was properly charged as township property.

Wherefore it results, that the judgment should be reversed and the case remanded, all the judges concurring.

—o—

STATE OF MISSOURI, Respondent, *vs.* WILLIAM BARNES, Appellant.

1. *Criminal law—Trial—Failure to arraign prisoner.*—Trial cannot proceed against a prisoner for an offense for which he has not been arraigned, and of which he has not pleaded guilty.
2. *Criminal law—Appeal—Record must show presence of prisoner when, etc.*—On appeal from the verdict against defendant in an indictment, unless it appear from the record that the prisoner was in court during the trial and at the rendition of the verdict, the cause will be reversed.
3. *Criminal law—Reversal of cause—Prisoner, if in penitentiary, remitted to county jail.*—Where on reversal of a criminal cause, it appears that the prisoner is in the penitentiary by virtue of the sentence, an order will be made remitting him to the custody of the jailor of the proper county.

Appeal from Clinton Circuit Court.

Porter & Merryman, for Appellant.

Corn & Hughes, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

Upon the trial in this case irregularities were committed which must necessarily lead to a reversal.

The indictment was for murder in the second degree and the accused was arraigned and put upon trial for murder in the first degree. After several witnesses were examined, the court then stated that the trial must proceed for murder in the second degree, and there was no re-arraignment or plea of not guilty for that offense.

A party cannot be tried for a crime for which he is not indicted; nor can a trial proceed against him for an offense for which he has not been arraigned and pleaded not guilty.

Again the record does not show that the defendant was present in court when the jury returned and delivered their verdict, nor when the court pronounced its sentence upon him. And it appears that he was absent a part of the time when the witnesses were being examined. The statute declares that no person indicted for felony can be tried unless he is personally present during the trial (Wagn. Stat., 1103, § 15); and we have always held that it was necessary for the record to show that the prisoner was in court during the trial and at the rendition of the verdict. (State vs. Mathews, 20 Mo., 55; State vs. Buckner, 25 Mo., 167; State vs. Cross, 27 Mo., 332; State vs. Braumschweig, 36 Mo., 397; State vs. Ott, 49 Mo., 326.)

The judgment must be reversed and the cause remanded, and as it appears that the defendant is now in the penitentiary by virtue of the sentence of the court, an order will be made that he be taken therefrom and remitted to the custody of the jailor of Clinton county, all the judges concurring.

CATHERINE CUSTER, Respondent, *vs.* J. A. ARBUTHNOT, *et al.*, Appellants.

1. *Appeal—No brief, etc., filed.—Result.*—Where appellant fails to file statement and brief, appeal will be dismissed.

Appeal from Chariton Common Pleas.

WAGNER, Judge, delivered the opinion of the court.

The appellants having neglected to file any statement and brief as the law requires, the appeal in this case will be dismissed; the other judges concur.

NORA MARY CORNWELL, Respondent, by her guardian, MONSON LEMONDS, *vs.* ALFRED THURSTON, Appellant.

1. *Deed—Description, what sufficient—Town lots, etc.*—A deed described the land conveyed as "the south-west quarter of the south-east quarter of section twenty-seven" etc., "save and except what I have heretofore conveyed to divers persons." *Held*, sufficient as *inter partes* to convey all the land not previously sold, although the same had been laid off into town lots with plats recorded.

Appeal from Mercer Circuit Court.

Wright & Orton, for Appellant.

I. The description of the forty acre tract as described in the deed was no description of the lots in controversy. (Henry vs. Mitchell, 32 Mo., 512; Evans vs. Ashley, 8 Mo., 177.)

H. J. Alley, with S. H. Perryman, for Respondent.

I. Deeds and exceptions therein are construed most strongly against the grantor. (Nelson vs. Brodhack, 44 Mo., 596; Clemens vs. Rannells, 34 Mo., 579.) The authorities cited by defendant's counsel are not in point. The conveyances in those cases were made by virtue of sales under executions, and were construed most strongly in favor of the execution debtor; in those cases there was involved a matter of the sufficiency of the description to pass the title; in this case simply the intention of the parties to the conveyance.

NAPTON, Judge, delivered the opinion of the court.

This was an ejectment to recover four lots in Girdner's addition to the town of Princeton.

There was an agreed state of facts as follows: 1st. That one Wm. J. Girdner was the owner of the south-west quarter of the south-east quarter of section 27, T. 65, R. 24 on March 2nd, 1854; 2nd. that on that day, said Girdner platted and laid out into an addition to the town of Princeton in Mercer Co., Mo., a part of said forty acre tract, said town plat being about one and one-half acres, consisting of two

blocks and fourteen lots in all, dedicating streets and alleys to the public, and recorded his said plat in the recorder's office in Mercer Co., Mo., March 2nd, 1857; 3rd. that prior to the sale to Cornwell, hereinafter mentioned, he had sold four of said lots to persons who had improved them and built on two of them prior to the sale to said Cornwell—said streets and alleys were open to and used by the public ever since the recording of said plat; 4th. that before the sale hereinafter mentioned to Cornwell, said Girdner had sold and conveyed to two other persons other parts of said forty acre tract; to one about eight acres and to another about one and one-half acres; 5th. that there was on said tract a church with a lot of one acre which was excepted in the deed to Cornwell, occupied by the church, but conveyed by deed; 6th. that the lots in controversy remained unoccupied and unimproved, until defendant took possession in the spring of 1871 and put a fence around them, under a conveyance of said lots from Girdner to him, made, acknowledged and recorded Jan'y 2nd, 1871; 7th. that plaintiff derives title to said lots as the heir of said Cornwell under a general warranty deed in usual form, executed and acknowledged, delivered and recorded Feb. 15, 1865, from said Girdner to said Cornwell, in which the description of the land is "the south-west quarter of the south-east quarter of section twenty-seven, township sixty-five, range 24, save and except what I have heretofore sold and conveyed to divers persons; also save and except one acre in the south-west corner of said tract reserved for a site for a Baptist Church;" 8th. at the date of the deed, Girdner owned the lots in controversy and about twenty-eight acres of said forty acre tract. The four lots in controversy are four of the lots in Girdner's addition. Girdner being dead, the plaintiff is his sole heir.

Upon this state of facts the court declared the law to be, that plaintiff was entitled to recover, and we think this declaration was right.

The cases of Evans vs. Ashley, 8 Mo., 177; Rector vs. Hart, 7 Mo., 53; Clemens vs. Rannells, 34 Mo., 579, and

various other cases in regard to sheriff's sales under execution, are inapplicable to this case. The reason of the principle asserted in those cases has no application to sales *inter partes.*

The descriptive words of the deed are amply sufficient to convey all the forty acres which had not been previously conveyed, whether laid off into lots or not, and the purchaser and seller must have so understood it.

Judgment affirmed; the other judges concur.

ADDISON PAYNE, *et al.*, Respondents, *vs.* EDGAR STANTON, Appellant.

1. *Voluntary conveyances—Effect as to subsequent creditors.*—As to creditors existing at the time of a voluntary conveyance, if its effect and operation be to hinder or defraud them, it may be held invalid; but the doctrine is well settled that such a conveyance, although the maker be at the time in debt, is not, as to subsequent creditors, fraudulent, without proof of actual or intentional fraud.

Appeal from Sullivan Circuit Court.

Hyde & Christy, with Geo. W. Easley, for Appellant.

I. To set aside a prior voluntary conveyance, a subsequent creditor must prove fraud in fact. (Read vs. Livingston, 3 Johns. Ch., 501; 2 Sto. Eq., §§ 355–366; Saxton vs. Wheaton, 8 Wheat., 229–30; Pepper vs. Carter, 11 Mo., 540; Vogler vs. Montgomery, 54 Mo., 577.)

R. D. Morrison, for Respondents.

It is not contended that the conveyance from George to Edgar Stanton is fraudulent *per se;* but it is contended that the evidence clearly shows that it was fraudulent as against his creditors and the plaintiff in this suit.

WAGNER, Judge, delivered the opinion of the court.

From the record it appears that in the year 1859, George Stanton, the father of the defendant herein, conveyed to the defendant the lands in controversy in this suit. The defendant was a minor at the time and the conveyance was voluntary. George Stanton at that time was about to start for California and he was indebted to one Jackson in about the sum of fifty dollars, which he subsequently paid. He returned from California in 1870 or 1871 and again became indebted to Jackson in a little upwards of one hundred dollars, and then left his family and went to Texas. On the last named indebtedness, Jackson obtained judgment; and the plaintiffs bought the land under execution issued thereon. George Stanton's wife and the defendant continued to reside on the land, and still reside on it. It is shown that at the time the conveyance was made in 1859, George Stanton had some personal property, and there was no evidence that the conveyance was made with any fraudulent intent, or any contemplated future indebtedness.

This suit was instituted to set aside the conveyance made to the defendant as fraudulent, and the court set the same aside, and the defendant appealed.

The doctrine is well settled that a voluntary conveyance by a person in debt, is not, as to subsequent creditors, fraudulent *per se*. To make it fraudulent, as to subsequent creditors, there must be proof of actual or intentional fraud. As to creditors existing at the time, if the effect and operation of the conveyance are to hinder or defraud them, it may as to them, be justly regarded as invalid, but no such reason can be urged in behalf of those who become creditors afterwards.

Judge Scott in Pepper vs. Carter, (11 Mo., 540) discusses this question and says: "The question as to what will render a voluntary conveyance void as to creditors under the statute (13 Eliz.) from which ours is borrowed, is one like the question of continuing in possession of property, after its sale, and like it has undergone much discussion, and it is the subject of contradictory opinions."

Some would make an indebtedness *per se*, evidence of fraud against existing creditors. Others would leave every conveyance of this kind to be judged by its own circumstances, and from them infer the existence or non-existence of fraud in each particular transaction. Without determining the question as to existing creditors, we may safely affirm that all the cases will warrant the opinion that a voluntary conveyance as to subsequent creditors, although the party be embarrassed at the time of its execution, is not fraudulent *per se* as to them; but the question whether it is fraudulent or not, is to be determined by all the circumstances. I do not say that the fact of indebtedness is not to weigh in the consideration of the question of fraud in such cases; but that it is not conclusive.

Chancellor Kent, who maintains the most rigid doctrines with regard to the effect of voluntary conveyances against creditors, after a full examination of the authorities, concedes "that actual fraud, or fraud in fact, must be proved in order to set aside a prior voluntary conveyance at the suit of subsequent creditors. It is needless to enter into an examination of the cases, to maintain this doctrine; it has been done already, and by those whose capacity cannot be questioned." The learned judge then refers to Read vs. Livingston, 3 Johns. Ch., 501; 2 Story's Eq. Jur., §§ 355–366; Sexton vs. Wheaton, 8 Wheat., 229; and Ridgway vs. Underwood, 4 Wash. C. C., 137.

All the authorities are referred to by Hare & Wallace in their notes to Sexton vs. Wheaton (8 Wheat. 229) and Salmon vs. Barnett, (1 Conn., 525) in 1 Am. Lead. Cas., 49; and the rule above announced is universally established. There are no contradictory decisions in this court. The cases of Potter vs. McDowell, (31 Mo., 62,) and Potter vs. Stephens, (40 Mo., 229) were cases where the creditors existed at the time the voluntary conveyances were made.

When George Stanton, the father in the present case, made the voluntary conveyance, it does not appear that he owed anything except the fifty dollars. That debt he afterwards

paid off. As long as he did not contemplate defrauding any body, and his act would not have that effect, he had the unquestioned right to make whatever disposition he saw fit of his property.

The debt for which the conveyance is now sought to be set aside was contracted some eleven or twelve years after it was made. It is not probable that this was in the contemplation of the party when he made the deed. At all events, before the plaintiffs are entitled to their remedy, they must prove the actual existence of a fraudulent intention when the conveyance was executed. That they entirely failed to do.

Wherefore the judgment must be reversed, all the judges concurring.

JNO. S. PATEE, *et al.*, Respondents, *vs.* GEO. D. MOWRY, *et al.*, Appellants.

1. *Administration—Sale under settlement—Notice unnecessary—Constr. Stat.*—Where, under § 47, Art. III of the administration law, (Wagn. Stat., 100) an order of sale is granted on annual settlement of an executor or administrator, no notice of sale is necessary. The settlement itself operates as notice, and the title is not vitiated by failure thereof.

Appeal from Nodaway Circuit Court.

Pike & White, with E. A. Anthony, for Appellants.

I. Upon a settlement where the court finds that the personalty is insufficient to pay the indebtedness proven against the estate, no order of notice to the heirs is necessary to make a valid order of sale. (Administration Act, Art. III, § 47; Wagn. Stat., 100.; Valle vs. Fleming's Heirs, 19 Mo., 454.)

II After an order of sale made upon petition and order of notice duly given, no further notice is necessary to make valid an order of sale of additional lands, where the land sold proves insufficient to pay the debts mentioned in the admin-

istrator's petition. (Frye vs. Kimball, 16 Mo., 21; Johnson vs. Overton, 17 Mo., 443; Sheldon vs. Wright, 1 Sells., 497.)

John Edwards, for Respondents.

I. By the terms of section 47, Art. III, ch. 2, (Wagn. Stat.) relating to administration, the same notice is required to the parties interested, before the court can order the sale of the lands of the decedent, to pay his debts, as is declared necessary under §§ 25 and 26. And sale without notice is void and the title worthless as against the respondents. (Valle vs. Fleming, 19 Mo., 454; Babbitt vs. Doe, 4 Ind., 335; Doe vs. Anderson, 5 Ind., 33; Doe vs. Brown, 8 Ind., 197; Guy vs. Pierson, 21 Ind., 18; Hawkins vs. Hawkins, 28 Ind., 66; Gilstrop vs. Moore, 26 Miss., 206; Hamilton vs. Lockhart, 41 Miss., 460; Campbell vs. Brown, 6 How., [Miss.] 230; Sherry vs. Denn, 8 Blackf., [Ind.] 542; Cooper vs. Sunderland, 3 Ia., [Clark,] 137; Thornton vs. Mulquinne, 12 Iowa, 549; Stark vs. Brown, 12 Wis., 572; Gibbs vs. Shaw, 17 Wis., 197; Bloom vs. Burdick, 1 Hill, 130; Schneider vs. McFarland, 2 Comst., 459; Corwin vs. Merritt, 3 Barb., 341; Sibley vs. Waffle, 16 N. Y., 180; Lessee of Adams vs. Jeffries, 12 Ohio, 253; Messinger vs. Kintner, 4 Binney, 97.)

Wagner, Judge, delivered the opinion of the court.

The plaintiffs, who are the heirs of Elijah C. Patee, deceased, brought their action to recover the land described in the petition, which belonged to their ancestor in his life-time. The defendants derived their title from a sale made by Patee's administrator.

The material facts on which the decision must rest, are as follows: Prior to the 26th day of April, 1867, the administrator had filed inventories of the personal and real property belonging to the estate, and debts to a large amount had been proved up. On that day he filed his petition for the sale of the real estate inventoried, all of which was situated in Buchanan county; which petition was accompanied by the usual exhibits, showing the insufficiency of the personalty to pay the debts.

The court granted the customary order, due notice having been given in conformity to the statute. The sale was regularly made and approved, but it did not realize a sufficient amount to pay off the indebtedness which the estate owed. On the 13th of July, 1868, an additional inventory of the lands in dispute, which were situated in Nodaway county, was filed; and on the next day the administrator made his settlement with the Probate Court, showing the application of the monies which had come into his hands, and that all balances due the estate, together with the personalty undisposed of, would not pay the indebtedness. Upon this settlement and the motion of the administrator, the court at the same term ordered the sale of this land embraced in the last inventory. No notice was given of the intended application for this last order of sale, and for that reason it is contended that the order and the sale made thereunder were void; and that the purchaser at the sale, which was otherwise regular, took no title. Of this opinion was the court below, and judgment was rendered for the plaintiffs.

The whole question depends upon the construction placed upon the 47th section of the administration law, relating to sales of real estate by administrators. (Wagn. Stat., 100, ch. 2, Art. III.) That section read thus: "If upon the settlement of the accounts of any executor or administrator, it appear that the personal estate is not sufficient to pay the debts and legacies, the court may make such order as it may think necessary for the sale of the real estate for that purpose, and the sale shall be conducted and the same proceedings had in relation thereto as is provided in this chapter in relation to the sale of real estate for the payment of debts upon the petition of the executor or administrator, creditor or other person interested."

Where the realty is desired to be sold, upon the petition of the administrator or a creditor, the 25th section of the same chapter and section says: "When such petition and such accounts, lists and inventories shall be filed, the court shall order that all persons interested in the estate be notified

thereof, and that unless the contrary be shown on the first day of the next term of the court, an order will be made for the sale of the whole, or so much of said real estate as will pay the debts of the deceased. Such notice shall be published for four weeks in some newspaper in the county in which the proceedings are had, or by ten hand-bills, to be put up in the public places in said county, at least twenty days before the term of the court at which such order will be made, in the discretion of the court." The 26th section then provides, that "Upon proof of publication, the court shall hear the testimony, and may, if necessary, examine all parties on oath touching the application, and make an order for the sale of such real estate, or any part thereof, in this State, at public or private sale."

Under the 25th section the proceedings may be initiated or set on foot by the administrator or a creditor at any time. They need not be at any stated term. The application for the order of sale may be made at any term. As the law does not prescribe the term, a notice is required to give jurisdiction that all persons interested may be present and have a hearing. Proof of this notice is a necessary preliminary, and when it is made the court may then proceed to examine all parties on oath touching the application. All parties interested are in court for the protection of their rights, and they may show the necessity of the order or why it should be granted, or they may resist it, or pursue what further remedy they desire.

But an entirely different aspect is presented where the sale is ordered under the 47th section. There upon the settlement of the accounts of the executor or administrator, if it appear that the personal estate is insufficient to pay debts and legacies, the court may make the order to sell real estate if it thinks proper, and the sale is to be conducted and the same proceedings had in relation thereto as is provided in relation to the sale of real estate for the payment of debts, upon the petition of the executor or administrator, creditor or other person interested.

This section requires no petition nor exhibit of accounts, lists and inventories. The settlement stands in lieu of them, and furnishes the requisite information. No provision is made for giving any notice, because the settlement is made at a time prescribed by law, and when everybody is legally notified of that fact. Every person having any interest in the estate or in the settlement thereof is bound to take notice of the time the administrator makes his annual settlements, and the law provides what may be done at such settlements relating to the matter of ordering sales of real estate. All who are then interested are in court where they have the right to be heard. The fair construction of the law is, that no notice is necessary or required where the order of sale is granted upon the settlement of the administrator; but that the sale must be conducted and the same proceedings had, —that is, in reference to appraisement, etc.,—as when the sale takes place upon petition under the 25th section.

It results therefore, that the judgment must be reversed; all the judges concur.

HOLT COUNTY, Defendant in Error, *vs.* CHARLES HARMON, *et al.*, Plaintiffs in Error.

1. *Counties—Loan for benefit of county "internal improvement" fund—Purchase of land by county at sale of land mortgaged to secure loan, etc.*—A bond with mortgage on certain lands was executed to Holt County to secure the payment of sundry county funds loaned "for the benefit of the internal improvement fund" of said county. At the mortgage sale the County Court, through its attorney, bought the land, bidding therefor the full amount of the loan, but afterwards re-advertised it, and on sale to a third party, it bringing only a portion of the debt, suit was brought on the bond for the remainder. The answer set up the first sale in satisfaction of the debt. *Held*, that the County Court had no power to purchase the land; that the bidding by its attorney was a nullity and properly disregarded, and re-sale of the land properly ordered.

Semble, that the County Court owns no fund known as "internal improvement" fund. But in reference to special funds of every description committed to its care, it acts not as owner but merely as a trustee, to carry out specific provisions of the law; and the purchase of land in such circumstances is not one of its delegated powers.

2. *Judgment without notice, taken advantage of, how.*—A judgment against one not brought into court by notice or appearance, cannot be taken advantage of in a collateral proceeding but will be reversed on appeal or writ of error.

Error to Holt Circuit Court.

T. H. Parrish & B. Pike, for Plaintiffs in Error.

I. The County Court of Holt County, in the collection of the bond sued on, being the agent of the county, all the acts of such agent within the scope of its authority, express or implied, are binding on the county, and the purchase of the mortgaged lands by the county attorney, expressly authorized for that purpose, was binding on the county and court. (33 Mo., 361; 29 Mo., 71; 28 Mo., 589.)

II. Holt County, by law, is authorized in some cases and for some purposes to take and hold the title to real estate and is a *quasi* corporation. And it is a well settled doctrine, that where a corporation, or *quasi* corporation, is authorized to acquire and hold title to real estate for some purposes, it cannot be made a question by any party, except the State, whether or not real estate acquired by such corporation has been acquired for the authorized uses or not. (Hayward vs. Davidson, 41 Ind., 212, 213; Chambers vs. City of St. Louis, 29 Mo., 543.)

James Limbird, for Defendant in Error.

I. County Courts can exercise no powers except such as are expressly or impliedly delegated to them by the legislature of the State, and the statute nowhere authorizes the County Court to bid on any real estate or become its purchaser at any sale under a mortgage to secure a loan; and such bid is void. (49 Mo., 236.)

II. The County Court in the management of the "internal improvement" funds are governed by the statute law governing the management of the school fund. (Wagn. Stat., §§ 18, 19, 20, p. 870; §§ 78, 81, 83, 87, 89, pp. 1258–59; 44 Mo., 79; 15 Mo., 604; 7 Mo., 194.)

VORIES, Judge, delivered the opinion of the court.

This action was brought to recover an amount charged to be due on a bond for seven hundred dollars with interest, executed by the defendants, Charles Harmon and Peter Bender as principals, and John C. Bender, William A. Harmon and Nimrod "J. Kyger as sureties" to Holt County, for the benefit of the internal improvement fund in said county.

The petition was in the usual form, and the bond in the form usually used by the county when loaning portions of the school funds belonging to the county. The bond sued on was also secured by a mortgage executed by the principals therein, by which they conveyed a tract of land to the county to secure said bond, the mortgage being in the form of mortgages taken to secure school township money.

It appears from the record, that the only defendants served with process, or who appeared to the action, were Nimrod Kyger and John C. Bender. These two defendants, who were served, appeared in the Holt Circuit Court and filed their answer to the plaintiff's petition, in which they admitted the execution of the bond sued on, but denied that they were then indebted thereby.

The said defendants, as a defense to said action, charged that the note or bond sued on was executed to Holt County for the use and benefit of the "internal improvement" fund of said county, by said Charles Harmon and Peter Bender as principals, and the said defendants as their sureties; that at the time of the execution of said bond, Charles Harmon and Peter Bender, in order to secure the payment of said bond, executed to said county their deed with power of sale, wherein the sheriff of Holt County was made the trustee, conveying for the security of said bond a tract of land therein named, which was fully sufficient to secure the amount due by said bond, and which land is still worth the full amount thereof; that afterwards, on the 7th day of March, 1872, the County Court of Holt County, by their order in writing, directed the sheriff of Holt County to sell said real estate for the purpose of paying said debt; that said sheriff in pursu-

ance of said order did advertise said land for sale on the 15th day of April, 1872, at the court house door in said county as the law and said deed directed; and that on said day said sheriff did, pursuant to said advertisement, sell said land at the said court house door to the highest bidder for cash; that said defendants as sureties in said bond as aforesaid, attended said sale for the purpose of making said land bring a sufficient sum to pay the whole amount due on said bond and for said purpose they did bid upon said land; that one T. C. Dungan, who was the acting county attorney for said county, by the direction of the County Court, did bid for said county the full amount of said bond, interest and costs, and being the highest bidder, the said land was struck off and sold to said county for a sum sufficient to discharge the whole amount due by said bond as aforesaid; that afterwards, on the 10th day of May, 1872, the said County Court, with the intent to cheat said defendants, induced said sheriff, who was trustee as aforesaid, to return said land not sold, for want of bidders, which return was so fraudulently made by said sheriff; that on said 10th day of May, 1872, said County Court made another and second order in writing, directing said sheriff to again sell said land for the said purpose, as alleged, of paying off and discharging the amount due by said bond; that in pursuance of said last named order, said sheriff did, on the 19th day of August, 1872, at the court house door, again sell said land to the highest bidder for cash in hand, and that one Collins became the purchaser at, and for the sum of $382; that out of said sum, the sheriff first paid all costs incurred in said sales; and the balance being $270, was credited on said bond.

It is then insisted by the answer, that by reason of the purchase of said land by said county at the first sale thereof, for an amount sufficient to discharge the amount due by said bond, said defendants paid no further attention to the matter and knew nothing of the second sale by the sheriff until long after said sale; that by reason of all such acts on the part of the county and its agents, defendants insist that they are ful-

ly discharged from further liability on said bond sued on, wherefore they pray judgment, etc.

To this answer the plaintiff demurred, on the grounds that the answer did not state facts constituting any defense to the action, and on the ground that the county had no authority or capacity to purchase said land at the first sale thereof; that said attempted purchase being a mere nullity could not have the effect to release defendants; and several other argumentative grounds of demurrer were stated, which need not be here repeated.

The court afterwards upon a hearing of this demurrer sustained the same; and said two defendants standing by their demurrer and failing to further answer, final judgment was rendered against all of the defendants in the case. The defendants have sued out a writ of error, and brought the case to this court.

There are two grounds of objection raised and insisted on in this court, as reasons why the judgment rendered by the Circuit Court should be reversed.

It is first insisted that the answer filed in the case by the defendants, John C. Bender and Nimrod J. Kyger presented a sufficient and legal defense to the plaintiff's action; and that the court therefore erred in sustaining the demurrer to said answer, and in rendering a judgment against said defendants on the demurrer.

It is secondly insisted, that the court erred in rendering a judgment in the cause against all four of the defendants in the case, when only the two defendants answering were ever served with process or ever appeared in the case.

As to the first objection raised by the defendants, that the court erred in sustaining the demurrer to the answer filed in the cause, it would seem that the solution of the question would somewhat depend on the power of the County Court over the fund for which the bond sued on was given. It is stated in the answer that the bond was taken for the benefit of the "internal improvement" fund of the county of Holt. The attorneys in the case have not referred us to any statute

now in force which designates any fund under the charge of the County Court, which is, by law, designated as the "internal improvement" fund. We have a road and canal fund, or three per cent. fund, which comes into the hands of the different County Courts for specific purposes; but which fund does not belong to the county, properly speaking, and over which the County Court has no control except as provided by the statute. (Wagn. Stat., 1215; Pettis County vs. Kingsbury, 17 Mo., 479.) By the 19th section of the statute above referred to, the County Courts of the several counties are authorized to transfer this fund to the public school fund.

By the 74th section of the statute of this State concerning schools, it would seem that almost all of the special funds arising from donations of land by the United States to the State of Missouri, or otherwise coming to the State from gifts, bequests, etc., now constitute a public school fund. (Wagn. Stat., 1257.)

And it is also provided by the statute concerning swamp lands that the moneys arising therefrom shall be governed and loaned as school monies are loaned and managed by the different County Courts.

These statutes are referred to, to show that nearly all of these special funds have been either merged into the common school fund, or are governed by the law regulating the control of school moneys by the several County Courts. And none of these special funds, which are intrusted to the control of the County Court for specific purposes, can properly be called the property of the county.

It seems to me that a question identical in principle with the one under consideration was decided in the case of Ray County vs. Bently and Barr, (49 Mo., 236). The bond in that case was similar to the one in this case, except that it was executed to Ray County for school money, and was so stated in the bond. A mortgage was also executed in that case by the principal in the bond on real estate with the usual statutory provisions. Default was made in the payment of the bond. The County Court of Ray County ordered the land to be

sold, and directed and authorized the county clerk to bid on the same. The clerk bid the principal and interest on said bond, and the property was struck off to him for the use of the county. Immediately after this the court, assuming that it had no power to purchase, ordered a re-sale of the property by the sheriff. At the second sale, Barr, the surety, bid in the property at an amount considerably less than the amount due on the bond; and an action was brought by the county, as in this case, to recover the balance due on the bond. The answer set up the first sale, as in the present case, as a satisfaction of the debt. The plaintiff replied, setting up as new matter the order of the court ordering a second sale and the purchase by Barr. This replication was on motion stricken out. It was held by this court that the County Court had no power to purchase the land; and, that the bidding off of the land by the clerk for the county was a mere nullity and was properly disregarded and a re-sale ordered. It is said in that case by the learned judge delivering the opinion of the court, that "the county is not the owner of the fund. The title is simply vested in it, as trustee, for convenience to carry out the policy devised by the law making power for the appropriation and distribution of the fund. In the care and management of the fund, the County Court acts purely in an administrative capacity, not as the agent of the county, but in the performance of a duty specifically devolved upon it by the laws of the State. There is nothing judicial in the exercise of its functions in this respect. The County Court does not derive its authority from the county, and it can exercise only such powers as the legislature may choose to invest it with."

I think that this reasoning applies to the present case and I will only add that in that opinion the questions involved are fully discussed and will not be further pursued here.

If the doctrine of that case is adhered to, the answer in this case was properly held to be bad, and we have no disposition to depart from the ruling in that case.

The second objection made by the defendants seems to have more force in it. The judgment, evidently, by oversight, was a general one against all of the defendants to the action, when only two of them had been served with process, or otherwise had notice of the action, and only the two who were served with a summons ever appeared in the action. This was, of course, erroneous; and although such an error could not be taken advantage of in a collateral proceeding, upon writ of error, such judgment will be reversed. (Lennox vs. Clark, 52 Mo., 115; Smith vs. Rollins, 25 Mo., 408; Pomeroy vs. Betts, 31 Mo., 419.)

For the reason that the judgment is in form against parties not served and who did not appear, the judgment is reversed and will be remanded to the Circuit Court where the proper judgment can be entered on the demurrer; or such other proceedings taken as may be consistent with the law in such cases; the other judges concur.

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JOSEPH C. HULL, Respondent, *vs.* WILLIS M. SHERWOOD, Appellant.

1. *Judgment—Assignment of by plaintiff to surety of defendant—Execution against co-surety—Motion to quash.*—A surety of defendant in execution, cannot by paying the amount of a judgment and obtaining an assignment thereof, by a summary proceeding at law, sue out an execution against his co-surety. And such execution may be quashed on motion.

Appeal from Buchanan Common Pleas.

Bennett Pike, with Vinton Pike, for Appellant.

Two questions are submitted upon the record.

I. Payment by one of several defendants extinguishes the judgment, whatever may be the intention of the parties to the transaction.

It is not in their power to keep the judgment on foot for the benefit of the party paying. Albin could not obtain a re-

lease for himself without the release of all his co-defendants. It was not legally possible for him to be an assignee of a judgment in which he was defendant. (Harbeck vs. Vanderbilt, 20 N. Y., 395, opinion of Selden, J., pp. 397, 98; Russell vs. Hugunin, 1 Scam., 562; Stevens vs. Moore, 7 Greenl., 24; Brackett vs. Winslow, 17 Mass., 159; Brackett vs. Winslow, 37 Mo., 573; Hammatt vs. Wyman, 9 Mass., 138; Adams vs. Drake, 11 Cush., 503; McDaniel vs. Lee, 37 Mo., 204.)

While in equity and under the statutes of some of the States, he is entitled to the lien of the judgment, and in a manner to an assignment of the judgment, he is in no case so entitled at common law. (1 Sto. Eq. Jur., 561, note 1; 6 Paige, 254–7; 10 Johns., 524.)

If successful in this proceeding, Albin obtains an undue advantage over Sherwood, his co-defendant and co-surety for Ayres. Any equitable defense or set-off, of which he could have availed himself in a suit for contribution, is cut off.

II. The case of McDaniel vs. Lee was an injunction, and jurisdiction was obtained for equitable adjustment between the parties. But equitable interference was not sought in this case. The proceeding was purely a legal one. (Reed vs. Austin, 9 Mo., 713; Western vs. Clark, 37 Mo., 568, and was also regular; Rucker vs. R. R. C., 44 Mo., 415; 38 Mo., 100; 34 Mo., 340.)

Loan & Mosman, for Respondent.

I. If Sherwood had been compelled to resort to a court of equity for an injunction to restrain the proceedings on the execution in this case, he would have no standing there until he had indemnified his co-surety for half the debt.

By resorting to a motion to quash the execution and calling it a proceeding at law, he cannot obtain any greater or other relief than he could in a court of equity. (Berthold, Adm'r of Sarpy. vs. Berthold, 46 Mo., 558; Furnold vs. Bank of State of Missouri, 44 Mo., 336; McDaniels vs. Lee, 37 Mo., 204.)

SHERWOOD, Judge, delivered the opinion of the court.

This case comes up here on appeal from the refusal of the court below to quash an execution issued at the instance and to the use of one Albin, to whom (he being the surety of Ayers, who was insolvent, and the co-surety of Sherwood the defendant) was assigned, upon its being paid in full, a judgment recovered by the plaintiff, Hull, against Ayres, Albin and Sherwood.

The motion was filed by the defendant and ought to have prevailed regardless of the intention with which the assignment of the judgment to the co-surety was procured. Hammatt vs. Wyman, 9 Mass., 138; Brackett vs. Winslow, 17 *Id.*, 154; Harbeck vs. Vanderbilt, 20 N. Y., 395, fully support this view; and our own decisions, so far as they go, do not militate against it.

This proceeding was a purely legal one, conducted in a summary manner, without the formalities of pleading, in which it was impossible to invoke the equitable doctrines of substitution or subrogation.

After Hull had received payment of his debt he could not have successfully sued out an execution; and for the same reason, it was beyond his power to authorize any one else to do so, under any pretext, in his name.

As to what would be the right of Albin in another form of procedure, it would be *dehors* this record to determine.

Judgment reversed and cause remanded; all the other judges concur.

LEONARD BLOSS, Appellant, *vs.* FRED. TACKE, Respondent.

1. *Injunction—Final judgment in—Subsequent motion to dissolve, when.*—After an injunction is made perpetual by a final judgment, which is regular, the case is *res adjudicata* and the court cannot afterward entertain a motion to dissolve the injunction.

Appeal from Buchanan Common Pleas.

F. T. Ledergerber, for Appellant.

H. M. Ranney, for Respondent.

Hough, Judge, delivered the opinion of the court.

It appears from the record in this cause, that in August, 1870, on the application of Leonard Bloss, the plaintiff, a temporary injunction was granted by the Common Pleas Court of Buchanan county, restraining the enforcement by execution of a certain judgment in favor of defendant Tacke and against Bloss, alleged to have been entered up fraudulently and without authority, by one Thompson, after he had ceased to be a justice of the peace, which injunction was at the hearing, on the 3d day of February, 1871, made perpetual by a final judgment in the cause.

Afterwards on the 27th day of October, 1873, defendant Tacke filed a motion to dissolve the injunction thus made perpetual, and on the 30th day of December, 1873, the court sustained said motion and awarded damages against the plaintiff. From this judgment the plaintiff has appealed to this court.

We do not see by what authority the Common Pleas Court undertook, nearly three years after the rendition by it of a final judgment, to interfere with it in this manner.

The motion did not seek to set aside the judgment for any irregularity, but its purpose and effect was to open up and re-examine the merits of a controversy which had become *res judicata*. The court had no power to annul its judgment in this way.

The judgment is reversed; all the other judges concur.

STATE OF MISSOURI, Respondent, *vs.* O. D. WILCOX, *et al.*, Appellants.

1. *Criminal law—Assault, recognizance for—Waiver of examination—Signature of bond.*—Where one is arraigned before a justice of the peace for assault, and *scire facias* issues on a forfeited recognizance of defendant to appear in the Circuit Court: *Held,*

1st. The transcript sent up by the justice need not state that defendant waived an examination, or that the officer gave judgment of committal against him.

2nd. The signature of defendant, placed in the body of the recognizance above the condition thereof, instead of at the bottom of the instrument, does not avoid the bond.

Appeal from Holt Circuit Court.

Zook & Van Buskirk, with T. H. Parrish, for Appellants, cited in argument State vs. Randolph, 22 Mo., 478, and contended that State vs. Bailey, 35 Mo., 168, did not apply.

James Limbird, for Respondent, cited 7 Wend., 345.

WAGNER, Judge, delivered the opinion of the court.

Upon complaint duly filed, Wilcox, the defendant, was arrested and taken before a justice of the peace, for an assault to kill his wife. He entered into a recognizance, with the other defendants, to appear before the Circuit Court to answer any indictment which the grand jury might find against him. At the next succeeding term of the Circuit Court he was indicted by the grand jury, but he failed to appear and the recognizance was forfeited. A *scire facias* was then issued upon application of the State, and at the return term, the defendants interposed a demurrer which was overruled, and they elected to abide by the same. An appeal was taken from the judgment thereon.

The grounds relied upon for a reversal, are that the recognizance was not taken by a court or officer having the right to take the same, and that the recognizance was not signed by the defendants.

The first objection is based on the fact that the magistrate does not state in his transcript that the defendants waived an examination or that he gave judgment of committal against

him. It is only necessary to refer to the cases of the State vs. Bailey, (35 Mo., 168) and the State vs. Rogers, (36 Mo., 138) to show that there is no force in this objection.

The second reason assigned is, however, more difficult. The justice certifies that the defendants appeared before him and acknowledged that they owed and stood indebted to the State in the sums therein specified; but they signed their names in the body of the bond, before the condition of the same and there were no signatures at the bottom.

The statute declares that: "All recognizances required or authorized to be taken in any criminal proceedings, in open court, by any court of record, shall be entered on the minutes of such court, and the substance thereof shall be read to the person recognized. All other recognizances in any criminal matter or proceeding of a similar nature, shall be in writing and shall be subscribed by the parties to be bound thereby." (Wagn. Stat., 1118, § 16.)

Undoubtedly the usual way of subscribing to an instrument is by placing the name or signature at the bottom of it; and that is the usual mode practiced and most certainly contemplated by the statute. But does it follow that where a person signs an instrument, the simple placing of his name in the wrong place will necessarily vitiate it?

In the case of Reed vs. Drake, (7 Wend., 346), it was decided that where an obligor signs his name in a bond above the condition thereof, the bond is valid, and the condition is as much a part of the instrument as if the signature was at the foot of it. The essential thing to give validity to the instrument is, that the obligors should sign or subscribe their names to it. This manifests their willingness to be bound. Whilst properly their signatures should be at the foot, yet if their names are placed somewhere else, though actually signed by them, I am not prepared to say that the bond will be absolutely void.

I think the judgment should be affirmed, all the other judges concur.

William J. Kelly, Respondent, *vs.* William Beauchamp, Appellant.

1. *Bond, attachment suit upon—Allegations as to breach, etc.*—In suit on an attachment bond, the allegation in the petition that plaintiff was compelled to expend "large sums of money and was put to great expense and trouble in and about defending said action of attachment, to-wit: five hundred dollars, "will authorize evidence touching special damages such as lawyers" fees, hotel bills, etc.

Appeal from Holt Circuit Court.

Zook & Van Buskirk, with T. C. Dungan, for Appellant, cited Wagn. Stat., 1013, § 3; Bankston vs. Farris 26 Mo., 175; Garvey vs. Fowler, 4 Sand., 665; Fagan vs. Davidson, 2 Duer., (N. Y.) 153; Wilson vs. Dean, 10 Iowa, 432; 42 Barb., 299; Squier vs. Gould, 14 Wend., 159; Sedg. Dam., 575-578; Donnell vs. James, 13 Ala., (N. S.) 490; Fuller vs. Banker, 11 Mich., 204; Roward vs. Bittinger, 3 Strob., 373; Chitty Pl., Vol. 1, p. 396, *et seq.*

Parrish & Collins, for Respondent, cited State to use of Rose, 19 Mo., 613; Hayden & Smith vs. Sample, 10 Mo., 217.

Napton, Judge, delivered the opinion of the court

This suit was brought on an attachment bond for $1,200 and the breach assigned was, that the plea in abatement in the case was found against the attaching creditor.

The petition charges that a saw mill of plaintiff was attached and some other property—specifying it—and alleges that the plaintiff was deprived of the use of the mill for about a year, and that a great portion of it had been destroyed and injured, and become useless; "that he was compelled to, and did lay out and expend large sums of money, and was put to great expense and trouble in and about defending said action of attachment, to-wit: five hundred dollars," and the damages altogether charged were $1200.

There was an answer denying all these allegations, except the giving bond, etc.

On the trial the court gave the following instructions: "It is admitted by the defendants in this case, that they executed the bond, etc. The only thing for the jury to determine is, the amount of damages actually sustained by the plaintiff, by reason of his property having been attached. "The jury will, in assessing damages, allow him for all money necessarily expended in traveling to and from his house to the place of trial, as well as expenses for hotel bills for himself while in attendance on the court defending said attachment, and a reasonable compensation for his time and attorneys' fees, as they may find from the evidence, in defending said attachment; and will also allow plaintiff such damages as they may think from the evidence he has sustained for the loss of the use of his property, or any injury or loss of the same or any part thereof, from the time it was taken on the attachment until the attachment was dissolved."

The court also gave the instructions asked by defendant, which were "1st. That unless they believe from the evidence the plaintiff sustained damages by reason of the stopping of said mill by the attachment, they will find for defendant, so far as that matter is concerned. And if they further find that said mill and machinery, or any part thereof, was damaged by reason of the withholding the same from plaintiff, under and by virtue of said attachment, they will only find the actual damage sustained by injury or loss of property from the date of the levy of said attachment up to the dissolution of the same in September, 1871, so far as the mill is concerned. 2nd. That the plaintiff is only entitled to a reasonable attorney's fee, for services in the plea in abatement in the attachment, and any services that may have been rendered in the civil action out of which the attachment grew, will be discarded from your consideration."

The court also gave the following instruction:

"The measure of damages in this case, so far as injury to the property is concerned, should be estimated by the actual injury done to the mill and machinery by reason of carelessness, and negligence and bad usage of the same by defendant

Beauchamp, and the officers and those having charge of the same, by his or their direction, not including in the estimate any damage for natural wear and tear, or damage by the elements which were unavoidable and not the result of any fault of the defendant or those having charge of the same, together with the reasonable value of the use of said mill, machinery and property, under all the facts and circumstances, and the condition in which it was, making allowance for expenses of feeding, keeping and preserving same, and necessary repairs from the time it was attached until the attachment was dissolved."

The jury found a verdict for $703, upon which judgment was rendered, and the usual motions in arrest and for a new trial were made and overruled.

The point made in this court is, that the breach in the petition, being general, did not authorize evidence concerning special damages, such as lawyers' fees, hotel bills, etc., incurred in the trial of the plea in abatement.

An examination of the case of Hayden & Smith vs. Semple, 10 Mo., 217, will show that the breach of the bond in that case was even more general than the breach assigned in this. The only breach in that declaration is, that "Sample's property, to the value of $3,000 had been seized under the writ, and the writ had been so prosecuted that Sample was compelled to and did lay out $1,000, and incur large liabilities and spend much time in the defense of the suit, and damage to the amount of $3,000 had in this manner accrued to Sample in consequence of the attachment." U der this declaration, the plaintiff was allowed to prove his traveling expenses, attorneys' fees, cost of taking depositions, loss of time, etc., and an instruction excluding this evidence was asked and expressly refused by the court.

The same question was inadvertently, or rather impliedly passed on in the case of Tho's Hale, Ex'r of Roe, vs. Thomas, 19 Mo., 63. There the direct damages and costs for taking depositions, attorneys' fees, for hotel and traveling bills, etc., were conceded; but evidence of injury to plaintiff's credit by a disarrangement of his business was held inadmissible.

The same point was decided by this court at the last term at Jefferson City, in Mackenzie, Adm'r, vs. Matthews, 59 Mo., 99.

No objections are made to the instructions in this case; indeed they are obviously correct.

Judgment affirmed, the other judges concur.

J. G. MARTIN, AMANDA WILLIAMS, EDWARD GLOVER, *et al.*, Defendants in Error, *vs.* GEORGE W. JONES, ROBERT AUSTIN, AND PATRICK MCCARTY, Plaintiffs in Error.

1. *Injunction of sale under deed of trust—Former conveyance of land as a gift, effect of—Testimony as to conveyance, what competent under witness act.*—Where injunction is brought to prevent sale of land under deed of trust, on the ground that the maker had already conveyed away a portion of the tract; *held*,

1st. That plaintiff need not show that a valuable consideration was paid for the land, provided the deed was not made in fraud of the rights of others.

2nd. That the grantee in the conveyance last mentioned being dead, and the conveyance, or knowledge thereof, being denied by the answer, under the statute (Wagn. Stat., 1372–3, § 1,) testimony of the grantor going to invalidate the deed would be inadmissible, but his testimony proving an admission, at the date of the deed of trust, by the grantee therein that the latter had notice of said conveyance would be competent. It was not intended by the statute to exclude one party, the other being dead, where the evidence related to transactions had with third persons, to which the deceased was no party, and of which he had no knowledge; or where the evidence referred to transactions which had taken place since the decease.

Error to Carroll Circuit Court.

Hale & Eads, for Appellants.

L. H. Waters, for Respondents.

VORIES, Judge, delivered the opinion of the court.

This action was originally brought by one Parmenius Williams against the defendants, to restrain and enjoin the defendants Austin and Jones from proceeding with the sale of certain lands under a deed of trust named in the petition.

During the pendency of the suit and after issues were joined in the case, the said Parmenius Williams departed this life, and the present plaintiffs, who are the heirs and representatives of said Williams, were made plaintiffs in his stead.

The petition states that the defendant Patrick McCarty, in the month of July, 1868, was the owner of the north west quarter of the south east quarter of section thirty-three, in township fifty-two, of range twenty-four in Carroll county, Missouri; that said McCarty, at said time by his deed of that date, conveyed to plaintiff the north half of said tract of land in fee simple; and that plaintiff took immediate possession of said north half of said land as aforesaid, and made permanent improvements thereon, and that plaintiff is still the legal owner of said north half of said tract of land; but that the deed conveying said land from McCarty to plaintiff although delivered, had never been acknowledged or recorded; that after the making of said deed by McCarty to plaintiff, and after plaintiff was in possession of the north half of said tract of land, in pursuance of said deed or conveyance on the 25th day of May, 1869, said McCarty executed and delivered to the defendant, George W. Jones, a deed commonly called a deed of trust, by which he conveyed to said Jones the whole of the first described tract of land including the north half thereof previously conveyed to plaintiff; that said conveyance was made to Jones in trust to secure a debt, due from McCarty to defendant Austin, and was conditioned that if default was made in the payment of said debt, Jones should have power to advertise and sell said lands as directed in said deed of trust; that default had been made and said Jones was then, at the request of said Austin, proceeding to advertise and sell the whole of said forty acre tract of land and would sell and convey the same unless restrained therefrom; that at and before the execution of said deed of trust to said Jones for the benefit of said Austin, both Austin and Jones had full notice that the north half of said forty acre tract of land had been conveyed to plaintiff and that he was in the possession of the same. It is therefore prayed by the petitioner, that the deed

of trust be canceled and made void as to the said north half of said tract of land and that defendant Jones be restrained and perpetually enjoined from proceeding to sell said part of said tract of land by virtue of said deed of trust, etc.

A temporary injunction was ordered on this petition and the defendant Jones notified to appear in the Circuit Court, etc.

The defendants afterward appeared in the Carroll Circuit Court and filed a joint answer to said petition and moved to dissolve the temporary injunction.

The answer of the defendants denies that defendant McCarty, on the — day of July, 1868, was the owner of the land named in the petition, or that he on said day conveyed the north half of said tract of land to the plaintiff, or that plaintiff took possession or improved the same, or that he is now the owner of any part thereof. It is admitted that at the time named in the petition, the defendant, McCarty, being then the owner of said forty acres of land, conveyed the whole thereof to defendant Jones by deed of trust, as it is charged in the petition; but it is denied that either said Jones or said Austin had any notice or knowledge that plaintiff had any claim to the premises. It is admitted that Jones is empowered under the deed of trust to sell the whole of said forty acres of land, and that he and Austin were proceeding to sell said land under said trust deed, and had advertised and would sell and convey the same under said deed of trust as well the north half of the same as all other parts thereof it not restrained therefrom.

The case was tried upon the issues thus made in the Circuit Court of Carroll county on the 31st of July, 1872.

It appears from the bill of exceptions in the record that on the trial it was admitted by the parties to the suit, that at the sale of the swamp lands of Carroll county in July, 1868, Patrick McCarty (one of defendants) became the purchaser of the forty acres of land described in the petition; and afterwards received a deed from the county for the same. This deed as set out in the record is in the usual form, reciting that Mc-

Carty had made full payment for the land, and is dated the 7th day of September, 1869.

The bill of exceptions further shows that the plaintiff then introduced in evidence, without objection, a deed, signed by said McCarty to Parmenius Williams, for the north half of said 40 acres of land, dated July, 1868, which was proved to have been executed by McCarty subsequent to the purchase by him from the county of Carroll. This last named deed is not set out in the bill of exceptions, the clerk noting in the record that it had not been furnished by the parties so that he could copy it in the bill of exceptions. No point is made or objection taken to the omission to copy this deed in the bill of exceptions.

The plaintiff then proved by witnesses that said Parmenius Williams (the original plaintiff) entered into possession of the 20 acres of land conveyed to him and cultivated and improved the same up to the time of his death; since which time the present plaintiffs have occupied the same. It was also proved by plaintiffs that the defendant Austin, the beneficiary in the deed of trust, had notice of the deed executed by McCarty to Williams, before the deed was made for his benefit to the trustee George W. Jones. The foregoing was all the evidence on the part of the plaintiffs.

The defendants then offered the testimony of the defendant Patrick McCarty. The court refused to permit him to testify in the cause; to which ruling of the court the defendants excepted.

The defendants then introduced defendant R. A. Austin as a witness in the case; but the court refused to permit him to testify in the case; to which the defendants again excepted.

This was all the evidence given or offered in the case.

The court found for the plaintiffs and rendered a decree making the injunction before rendered perpetual, and cancelling and making void the deed of trust executed by defendant Jones so far as the north half of the forty acres of land which was conveyed to Williams is concerned, etc.

Afterwards in due time the defendants filed their motion to set aside the decree rendered by the court and to grant a rehearing of the cause, because, 1st. The decree was against the law and evidence. 2nd. The decree was against the evidence. 3rd. The court improperly excluded the witnesses for the defendants. 4th. There was no proof that the plaintiffs were the heirs or legal representatives of P. Williams.

This motion was overruled by the court and the defendants again excepted, and have brought the case to this court by writ of error.

The defendants have raised several objections in this court to the action of the court trying the case, as grounds upon which they insist that the judgment rendered by the Circuit Court should be reversed.

It is first insisted that neither the petition nor the evidence avers or shows that the said Parmenius Williams paid McCarty any valuable consideration for the land in controversy, or that his purchase was in good faith or for value; and that therefore a Court of Equity will not interfere in his favor.

This objection is certainly untenable. If the land was conveyed by McCarty to Williams before the deed of trust was executed in favor of Austin, and Williams was at the time the legal owner of the land, it would make no difference to Austin, provided he knew of the title of Williams, whether Williams had paid a valuable consideration for the land or whether the land had been given to him; *Provided*, the transaction did not operate as a fraud upon others and could not be set aside on that account, which is not pretended by the defendants in this case.

It is next objected by the defendants that the court of its own motion, without any objection having been made by the plaintiffs, excluded defendant McCarty and defendant Austin as witnesses in the cause and peremptorily refused to permit either of said witnesses or parties to testify in the cause.

It is not stated in the bill of exceptions upon what ground these witnesses were rejected; but we readily conclude that they were rejected on the ground that Williams who was the

purchaser of the land from McCarty and who was the original plaintiff in this suit was dead, wherefore it was thought that the other parties to the suit were rendered incompetent to testify by our statute concerning witnesses.

The first section of the statute provides as follows: "No person shall be disqualified as a witness in any civil suit or proceeding at law or in equity by reason of his interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of effecting his credit: *Provided*, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party shall not be permitted to testify in his own favor."

The question in this case is, what is the contract or cause of action in issue and on trial? It was charged in plaintiff's petition that defendant McCarty had in July, 1868, conveyed to Williams the north half of the tract of land named in the petition. This fact was denied by the answer, so that the existence of said deed of conveyance was one of the issues in the case. Then again it was charged in the petition, that defendants Austin and Jones knew at the time of the execution of the deed of trust to Jones for the benefit of Austin, that Williams had the deed to the north half of the land and was the owner thereof. This allegation of notice to, or knowledge on the part of, said defendants was also denied by the answer, and formed another matter in issue in the cause, and in fact these two issues were the material and almost only real issues in the case on trial. Whether either of the matters in issue as above set forth, could be called the contract or cause of action in issue and on trial, within the meaning of the statute, is difficult to determine; but if the object in introducing the defendant McCarty as a witness was to elicit evidence from him, the tendency of which would be to affect or invalidate the deed from him to Williams, he would most certainly be incompetent for that purpose, as the other party to that contract was dead. But on the contrary, if the object was to contradict, by the evidence of McCarty, some testimony introduc-

ed by plaintiff to prove that Austin, at the time of taking the deed of trust, had notice of the plaintiff's deed and title to the land, then it may well be that his evidence would have been competent. As an example, suppose that one of plaintiff's witnesses had testified that at a certain time and place since the death of Williams, Austin had admitted, in the presence of McCarty, that he, at the time he took the deed of trust had full notice of the title of Williams, would McCarty be rendered by the statute incompetent to testify in explanation, or in contradiction of such evidence on the part of the plaintiff? It would certainly not come within the object or reason of the statute to exclude such testimony. It has been held by this court in several cases, that it was not intended by the statute to exclude one party where the other was dead, where the evidence related to transactions had with others and to which the deceased party was no party and with which he had no knowledge of or connection, or consisted of facts and transactions which had taken place since the death of the deceased party. (Stanton vs. Ryan, 41 Mo., 510; Looker vs. Davis, 47 Mo., 140; Poe vs. Domic, 54 Mo., 119.)

The same thing that has been said in reference to the defendant McCarty, may be said with reference to the defendant Austin. There may be material matters arising in the case to which he would be competent to testify.

The bill of exceptions failing to show the facts proposed to be proved by these parties or witnesses or the ground on which the witnesses were rejected and prohibited from testifying in the case. We, therefore, feel great reluctance in interfering with the case; but as the defendant may have been injured by the peremptory refusal by the court to permit the parties offered as witnesses to testify at all, we are inclined to send the case back for a re-trial.

The judgment will be reversed and the cause remanded; The other judges concur.

JOHN H. HOYT, Plaintiff in Error, *vs.* THOS. E. OLIVER, *et al.*, Defendants in Error.

1. *Deed—Bill to reform—Wife's inchoate dower—Demurrer—Voluntary deed.*—Suit being brought to correct mistakes in a deed of trust made to secure certain notes given previously; *held*, 1st. The husband being the owner of the land, the wife need not be joined as a party. Her inchoate right of dower is not such an interest as will require such joinder; 2nd. The deed being no part of the petition, could not be objected to by demurrer; 3rd. The deed was not a voluntary one which a court of equity would take notice of.

Error to Livingston Circuit Court.

Collier & Mansur, for Plaintiff in Error.

I. The note and deed were virtually one transaction.

II. The deed cannot be considered on demurrer. If it could, the want of seal cannot; but must be taken advantage of by answer. (Smith vs. Hart, 1 Mo., 274.)

III. An inchoate right of dower does not require the wife's joinder.

John E. Wait, for Defendants in Error.

I. The notes were made and accepted weeks before date of the deed of trust and formed no consideration for the deed; and being voluntary, it cannot be reformed and thereby divest the wife's dower, without giving her a day in court.

II. The deed had no seal; and a court of equity being invoked to reform the instrument will take cognizance of this fact.

SHERWOOD, Judge, delivered the opinion of the court.

This proceeding was instituted to correct a mistake made in a certain deed of trust by which Messer, who was to have been named therein, as *cestui que trust*, was named as trustee, and Russell, who was to have been named therein as trustee, was named as *cestui que trust*.

The petition alleges in substance, that Oliver being indebted to Messer, had executed to him a promissory note for $600, on the 4th day of April, 1870; and, being the owner

of certain real estate, ten days after, for the purpose of securing the debt, executed the deed referred to, but that by mistake of the scrivener, the intention of the parties was frustrated in the manner above set forth. A prayer is then made for the reformation of the deed, etc., etc.

Prior to suit brought, the note, to secure which the deed of trust was given, was assigned to plaintiff.

1. There was no necessity to make the wife of Oliver a party to the suit. The petition shows that he was the owner of the property and, as a matter of course, the only possible interest which the wife could possess, was an inchoate right of dower. (Riddick vs. Walsh, 15 Mo., 519.)

2. The deed of trust constituted no part of the petition; and therefore no objection could be raised to that deed in the manner attempted.

3. The rule is a familiar one, in reference to the powers which courts of equity exercise for the reformation of instruments in conformity to the intention of the parties thereto. (1 Sto. Eq. Jur., § 152, *et seq.*) And while it is true that courts of equity will not rectify a voluntary deed, unless all the parties thereto consent; (*Ib.*, § 164*c*) yet the one under consideration cannot be thus regarded, as the existing indebtedness of the grantor, was a valuable and sufficient consideration for making the deed to secure such indebtedness.

I have now briefly noticed the grounds specified by the demurrer; and have no hesitation in holding the petition, though very inartificially drawn, as sufficient.

It follows that the ruling of the court below was erroneous; and its judgment must be reversed and the cause remanded; all the judges concur.

JAMES A. MATNEY, Respondent, *vs.* FRANCIS GRAHAM, *et al.*, Appellants.

1. *Sheriff's sale—Purchase at—Outstanding title, etc.*—Defendant in an execution and those acquiring possession under him cannot defeat the recovery of the purchaser at the sheriff's sale by setting up an outstanding title.
2. *Ejectment—Possession of judgment debtor transferred by execution sale—Common source of title admitted—Ejectment by one having neither title nor possession, etc.*—If a judgment debtor at date of sale under execution has a bare possession, and no other claim, his interest to that extent is transferred by the sale and the judgment is a lien on that interest. And the purchaser may sue in ejectment against a defendant holding merely by virtue of an after acquired possession; and where plaintiff and defendant both claim under a common source of title, plaintiff need not prove chain of title further back, as the title held by the common source is admitted. But where plaintiff has neither title nor possession at date of execution sale, he cannot oust even a trespasser.

Appeal from Buchanan Circuit Court.

B. F. Loan, for Appellants.

I. The doctrine that neither party in an ejectment need go back of a common source of title on which both rely, has no application where, as in case at bar, defendant relies simply on his adverse possession. (Macklot vs. Dubreuil, 9 Mo., 477; Page vs. Hill, 11 Mo., 150.)

II. And plaintiff cannot defeat such possession by purchasing a subordinate title. But defendant being in possession may buy in any title in order to strengthen such possession, and will not be put in a worse position because his title proves subordinate and worthless.

In this case the common source of title has neither possession nor right of possession; hence, Brown vs. Brown, (45 Mo., 548); Fellows vs. Wise, (49 Mo., 350,) has no application.

Ringo & Vories, for Respondent.

I. The facts showing a common source of title, the title of the grantor cannot be denied. (Chouquette vs. Barada, 33 Mo., 249; Merchants' Bank vs. Harrison, 39 Mo., 433; Fugate vs. Pierce, 49 Mo., 441; Union Bank vs. Manard, 51 Mo., 548; Fellows vs. Wise, 49 Mo., 350; Brown vs. Brown, 45 Mo., 412; Tyl. Ej., 543, 557-8; 2 Greenl. Ev., § 307.)

II. The appellant claims under Hays and not Mrs. Noble, (same case, 50 Mo., 559,) and an outstanding title in her cannot avail him. (Fellows vs. Wise, 49 Mo., 350; Brown vs. Brown, 45 Mo., 412; Union Bank vs. Manard, 51 Mo., 548.)

NAPTON, Judge, delivered the opinion of the court.

This was an action of ejectment. The plaintiff claimed title from one Hays and attempted to trace title from Hays back to the United States; but in the opinion of the court that tried the case he failed in showing title in Hays. This chain of title is not preserved in the record and no question arises on it, and this court can, of course, give no opinion concerning it.

The plaintiff established a possession in Hays in the year 1866, which, however, was abandoned before the plaintiff purchased under execution and received a sheriff's deed in 1869. This execution was on a judgment against Hays in 1864.

The plaintiff then proceeded to prove that in 1868, Hays had made a deed of trust to one Self, to secure Burnside, (who was the defendant, Graham's landlord,) and that under a sale made by Self, Burnside became the purchaser and took possession of the lot.

Upon this evidence the court instructed the jury: 1st. That the sheriff's deed to James A. Matney for said lot 3 in block 4, vests *prima facie* all the title of said Hays in and to said lot; and that the deed of trust read in evidence from said Hays to Self, to secure Burnside in the payment of the note therein named of Jan'y 8, 1868, was subject to the lien of the judgment of plaintiff of June 30, 1864; and that the sale under said deed of trust and purchase by Burnside under the sale did not divest plaintiff's lien and give said Burnside a title superior to that of plaintiff to said lot—provided the jury believe from the evidence that Burnside, at the time of his purchase, knew that plaintiff, Matney, had purchased said lot at sheriff's sale under his judgment against Hays; 2nd. If the jury believe from the evidence that Burn-

side, after his purchase of said lot under the deed of trust from Hays to Self, took possession of it solely under and by virtue of such purchase and claiming said land solely under said purchase, and put the defendant, Graham, into possession of said land as his tenant, and Graham made no claim to said lot or the possession thereof, except as tenant aforesaid, then said defendant is estopped from denying title in said Hays and the jury will find for plaintiff, provided they further find that defendant, Graham, was in possession of lot 3, etc., at the commencement of this suit, and that Burnside purchased with notice of plaintiff's title.

Upon these instructions the verdict was for the plaintiff and the only question here is as to their propriety.

These instructions were no doubt designed to assert the familiar doctrine that a defendant in an execution and those acquiring possession under him cannot defeat the recovery of the purchaser at the sheriff's sale, by setting up an outstanding title.

The instructions entirely ignore the question of Hays' possession which was a question of fact for the jury. It is conceded that Hays had no title, or at least none was shown, and if he had neither title nor possession, it is not easy to see how a judgment, execution sale and sheriff's deed would pass any. But the judgment was a lien upon whatever interest Hays had in the lot; and although he had no title, yet if he was in possession at the date of the judgment, the sale under execution would transfer the possession or the right of possession to the purchaser. How this was in point of fact, does not appear, and the instructions should have been so qualified as to leave this to the jury.

There is no doubt that a pure possession alone will entitle a party to recover in ejectment, where the plaintiff connects himself with that possession. (Smith vs. Lorillard, 10 Johns., 355.) Here the plaintiff does connect himself with that possession, if the judgment under which he bought was a lien on such possession. But if the judgment debtor has no title and no possession either, upon which it can attach, he has no

right to turn out a mere trespasser. And certainly a trespasser is no worse off by buying up a worthless title and one subordinate to another title equally worthless. In such case the law does not interfere but leaves the possession where it is found. I do not regard the cases of Fellows vs. Wise, (49 Mo., 350); Brown vs. Brown, (45 Mo., 412); Merchants' Bank vs. Harrison, (39 Mo., 440); Union Bank vs. Manard, (51 Mo., 548,) as conflicting with these views.

Judgment reversed and case remanded; the other judges concur except Judge Vories not sitting, having been of counsel.

WILLIAM E. BLAKELY, Respondent, *vs.* LEWIS BENNECKE, Appellant.

1. *Bills and notes—Instrument given by U. S. officer for money received—Company rifles—County bounty.*—Suit was brought by the husband on the following instrument:

"Headquarters U. S. Forces,
Brunswick, Mo., January 3, 1865.

Received of Mrs. Catherine Blakely the sum of $500, to be used to buy Spencer Rifles for Co. I., 49th Regt. Mo. Vols. Said money to be returned as soon as the County bounty is paid to said Company, in full without interest.

LOUIS BENNECKE,
Capt. 49th Regt. Mo. Vols.,
Com'd'g Post."

Held, 1st, that the instrument was not ambiguous, and that parol testimony, to explain its meaning, was inadmissible; and that all cotemporaneous verbal agreements were merged in it; 2d, that by his answer, having failed to deny the execution of the note, or payment of the county bounty, the maker's liability was fixed by the pleadings; 3d, that having disclosed an irresponsible principal in the military company referred to, his liability was not that of agent, but was personal.

Appeal from Sullivan Circuit Court.

J. H. Shanklin, for Appellant.

Geo. W. Easley, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

Action on an instrument in this form:

$500. Head Qrs. U. S Forces,
Brunswick, Mo., January 3, 1865.

Received of Mrs. Catherine Blakely the sum of five hundred dollars, $500, to be used to buy Spencer Rifles, for Co. I., 49th Regt. Mo. Vols.; said money to be returned as soon as the County bounty is paid to said Company in full without interest.

LOUIS BENNECKE,
Capt. 49th Regt., Mo. Vols.
Com'd'g Post.

The suit was brought by the husband of Mrs. Blakely.

There were four counts in the petition; the first charged that plaintiff's wife, acting as his agent, on the 3rd day of January, 1865, loaned the defendant the sum mentioned, which he, by the instrument referred to, promised to return, etc., without interest, so soon as the county bounty should be paid as therein specified; that such payment was made on the 1st day of March, 1866, but the money borrowed was not returned, and judgment was asked with interest from the period last stated. The second count was for money loaned to defendant, and was like the first as to amount and time of loan, except that no instrument was declared on, nor time of payment designated. The third count was for money had and received; and otherwise was like the second. The fourth count was for the above mentioned sum; and charged that the same was obtained of the wife of plaintiff by duress, etc. To this last count a demurrer was sustained.

The defendant then answered to the remaining counts, admitting the execution of the instrument sued on, but denied that it was signed in his individual capacity; and stated that it was only executed by him as the agent of the company of which he was captain, and alleged that such agency was disclosed as well as the name of his principal, the said company, at and before receiving the money, etc. Neither the agency of Mrs. Blakely nor the payment of the county bounty on

the 1st day of March, 1866, was denied. There was a general denial on the other counts.

A reply was filed, and the parties went to trial, upon the first count in the petition; and the plaintiff, after reading the instrument sued on in evidence, without objection, and after proving by Mrs. Blakely that she was his wife, and that the money loaned belonged to him, rested.

A great deal of testimony was then introduced by the defendant, tending to show that he borrowed the money as the agent of and for the company, and not in any other capacity. Plaintiff in his turn also produced a large amount of testimony of a contrary tenor and effect. The jury after being abundantly instructed, as well on the part of defendant as of the plaintiff, found for the latter.

The defendant, by admitting the execution of the instrument in suit, and failing to deny that the county bounty had been paid, fixed his liability, and offered no barrier to plaintiff's recovery, as the instrument was not at all ambiguous, was couched in plain terms, and therefore offered no opportunity for the introduction of parol testimony as explanatory of the intent and meaning of the parties, and all contemporaneous verbal agreements were merged in that writing. But even had this not been the case, it is not seen how the privilege of introducing parol testimony for the purpose of varying the terms of the instrument, would have helped the defendant. He was personally chargeable even on his own showing, with the amount borrowed, and six per cent. interest from the first day of March, 1866, unless he had disclosed a responsible principal. (2 Kent. Com., 630.) But in this case there was no principal, either responsible, or otherwise, to disclose. "Company I" was incapable of suing or being sued, pleading or being impleaded, contracting or being contracted with. In short, it possessed none of the elements or attributes of a legal entity. The defendant was clearly liable on the instrument itself when coupled with his admission of the happening of the contingency therein referred to. And it was the duty of the court to have declared the legal effect to be given to the instrument.

The motion in arrest was properly overruled. Although there were several counts in the petition, yet all but the first were abandoned at the trial, so that the finding, however general, could have reference to but that one.

The case was tried on the wrong theory, as the judgment, however, was for the right party, it will be affirmed; all the judges concur.

JAMES M. RUSSELL, Plaintiff in Error, *vs.* ABNER WHITELY, Defendant in Error.

1. *Practice, Supreme Court—Objection to testimony, without specifying grounds, etc.*—The competency of evidence, to which only a general objection was made in the court below, without any assignment of grounds of objection, will not be considered by the Supreme Court.
2. *Ejectment—Equitable defense—Pleading as to.*—Defendant in an ejectment suit cannot avail himself of an equitable defense not pleaded.
3. *Mortgage—Land sold under—Void deed to purchaser—Possession of—Payment of mortgage debt—Defense in equity, when.*—Where land is sold under a mortgage, and the mortgage debt is paid with the proceeds, and the purchaser takes possession, although deed to the purchaser is void, yet he and those holding under him are entitled in equity to the rights of the original mortgagee, and such title is a good equitable defense to suit in ejectment by one holding under the mortgagor.
4. *Mortgage more than twenty years old not an outstanding title, when.*—A mortgage more than twenty years old, without proof of possession taken under it, and without proof that the debt existed at the institution of the action, is not such a title as will defeat a suit in ejectment.

Error to Platte Circuit Court.

John Doniphan, for Plaintiff in Error.

I. The court erred in refusing to permit the plaintiff to prove that the debt secured by the mortgage from Russell to Smith had been paid. The defendant in order to set up an equitable title as outstanding by a mortgage, has brought in a mortgage more than twenty years old, and without accounting for the absence of the note upon which it was founded.

Plaintiff will certainly be permitted to show the payment of this debt.

Milton Campbell, for Defendant in Error.

I. In the above case there was nothing for the jury to pass on. The validity of the deeds and legal proceedings, and their aggregate effect on plaintiff's claim were exclusively for the court.

II. A mortgage is a good outstanding title. (Howard vs. Thornton, 50 Mo., 291; Callaway vs. Fash, 50 Mo., 420.)

III. Defendant being in priority with mortgage by deeds from possessors under sale to satisfy the mortgage, can defend by the mortgage. (McCormick vs. Fitzsimmons, 39 Mo., 34; Johnson v. Houston, 47 Mo., 227; Howard v. Thornton, 50 Mo., 291; Jackson vs. Magruder, 51 Mo., 55.)

Hough, Judge, delivered the opinion of the court.

This was an action of ejectment brought by the plaintiff, as one of the heirs of James Russell, deceased, for the recovery of the south half of the north west quarter of section thirty-two, township fifty-three, range thirty-five, of which said Russell died seized, subject to a mortgage made by him in May, 1851, to one John Smith, to secure his note to said Smith, for one hundred and five dollars of even date with the mortgage, and payable three months after said date.

The petition was in the usual form, and the answer was a general denial only. The defense relied upon at the trial, was, that there was an outstanding title in the mortgagee, Smith, and defendant sought to connect himself with this mortgage by the introduction in evidence of a proceeding in the Probate Court of Platte county, instituted by Smith in 1852, for the sale of the land described in the mortgage, which seems to have been regarded at the time, and was treated on the trial in the Circuit Court, as a foreclosure of the mortgage.

It appears from said proceeding that an order was made directing the administrator to sell the land in controversy for

the payment of Smith's debt, and at the sale, which was made by one Nimrod Farley, as the agent of Andrew Russell, the administrator, one Amanda Russell became the purchaser, and in March, 1853, the purchase money having been paid, a deed was made to her by said Farley, in the name of Andrew Russell. In December, 1854, Amanda Russell conveyed to John Venneman, and he in August, 1859, conveyed the land in controversy and other land to his four children, as tenants in common, one of whom conveyed to the defendant, Whitely, his undivided interest thus acquired; and in 1868, in a proceeding in partition, under a special act in the Probate Court, to which he and his co-tenants were parties, the land was sold by the sheriff, and Whitely became the purchaser.

The execution by Russell of the mortgage to Smith was proved, and the mortgage read in evidence. The plaintiff then offered to prove that at the time of the sale Andrew Russell, the administrator, was in the State of California; and that prior to the sale he had paid to Smith the amount of the debt and interest secured by the mortgage, which testimony was by the court excluded, and the plaintiff excepted.

All the instructions asked by the plaintiff were refused, and they were not entirely unobjectionable; but it will only be necessary to notice the one given at the instance of the defendant, which is as follows: "The defendant moves the court to instruct the jury, that Abner Whitely, having purchased the real estate in controversy from the sheriff of Platte county, in a suit for partition among the grantees of John Venneman, taking a deed therefor, and having entered into possession thereunder, and John Venneman having purchased and taken a deed for said land from Amanda Russell, and entered into possession thereunder, and Amanda Russell having purchased and held said land under an order of sale made by the Probate Court of Platte county in a suit by John Smith against Andrew Russell, administrator of James Russell, to foreclose a mortgage, executed by James Russell to said John Smith, on the 2d day of May, 1851, which sale is

void; yet, notwithstanding said administrator's deed did not pass the legal title of James Russell or his heirs to said Amanda Russell, the jury will find for the defendant." To the giving of which instruction the plaintiff excepted.

The jury returned a verdict for the defendant, and judgment was rendered accordingly. Plaintiff filed a motion for a new trial, which was overruled, and he now brings the case here by writ of error. The plaintiff objected to all the testimony introduced by the defendant without, as far as the record shows, assigning any reasons, and now here, for the first time, specifies his grounds of objection.

Under the statute and the decisions of this court we cannot review any matter which was not directly passed upon by the court below. It is admitted that the sale made by Farley, as the agent of the administrator, and the deed made by him, were insufficient to pass the title to Mrs. Russell; but it is claimed that the mortgage debt was paid with the proceeds of that sale, and that this fact, together with the possession taken under said sale, and the mesne conveyances to the defendant, entitled him in equity to the rights of the original mortgagee, and constituted a good equitable defense to the plaintiff's action. This equitable defense was not pleaded by the defendant, and he could not avail himself of it at the trial. (Kennedy & Jackson vs. Daniels, 20 Mo., 104.) For this reason, and because it assumed the existence of facts not even in evidence, and usurped the province of the jury, this instruction should have been refused.

The mortgage, however, though over twenty years old, having been admitted to bar the recovery of the plaintiff, without any evidence as to possession under it, or the existence of the debt secured by it, (18 Mo., 530) it was clearly competent for him to change the presumption in such cases into an established fact, by showing that the debt secured by it had been paid by the administrator, and that it was not a subsisting title at the time of the institution of this action by plaintiff. (Norcum vs. D'Œnch, 17 Mo., 98.)

The judgment is reversed and the cause remanded; the other judges concur.

VICTOR B. BUCK, Respondent, *vs.* MAHLON ASHBROOK, and MARY ANN ASHBROOK, Appellants.

1. *Estate of married woman—Fund invested for, pursuant to bequest—Exemption of from husband's debts—Constr. Stat.—Failure to identify trust fund, etc.*—Land purchased by the executor, in the name of a married woman, pursuant to the directions of a will, with funds derived from the sale of real estate of the testator, are under the statute (Wagn. Stat., 925, § 14) exempt from sale for the debts of her husband. And this is the case whether the land is conveyed to her in the ordinary way, or to her sole and separate use; but where the fund thus set apart for the wife's benefit is so employed or invested as to become mixed with other funds, and to render it impossible to identify or trace it, equity cannot interfere.

2. *Equity—Land sold to satisfy debts—Homestead, etc.*—Where one buys land in his wife's name, and the conveyance is set aside on ground of fraud, and the property sold to pay his debts, there would, notwithstanding, be no error on the part of the court in allowing him a sum from the proceeds, with which to procure a homested a provided such debts were subsequent in point of time to the statutory exemption.

Appeal from Buchanan Common Pleas.

Ensworth, with Hill & Carter, for Appellants.

I. The lots are not subject to the payment of respondent's debts. (Sto. Eq., §§ 1068, 1072; Lead. Cas. Eq., vol. 2. part 2. pp. 334. 336. side p. 685, &c.; Hale vs. Coe, 49 Mo., 181; Gates vs. Hunter, 3 Mo., 511; Craig vs. Leslie, 3 Wheat., 578.)

A. H. Vories, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

This is a proceeding in the nature of a bill in chancery, brought against the defendants, who are husband and wife, by which it is sought to subject certain real estate held by the wife, to the debts of the husband, on the grounds that he was in embarrassed circumstances, and largely indebted, and in order to hinder, delay and defraud his creditors, both prior and subsequent, caused the real estate which he bought from time to time, to be conveyed to his wife; that during the time that he was thus engaged, that is to say, from the year 1859 to the year 186–, he did business in the name of his wife, borrowed money, dealt as a merchant in goods, wares and merchandise, falsely and fraudulently representing that his

wife was a sole trader; that he had full power to contract and to do business in her name, and that her property would be bound by such contracts, and that the wife was doing all in her power to aid and abet her husband in his fraudulent designs of thus acquiring property, and of placing the same out of the reach of his creditors, by a conveyance to herself.

The defendants filed separate answers. That of the husband, Mahlon Ashbrook, admitted that he purchased the real estate in question and had the conveyance made to his wife; but claimed that this was done without any fraudulent intent, and that the purchase of such property was made with money which the wife derived through her father's will, and with the profits which he had realized by employing this money in business he had bought the property sought to be charged, and made the improvements thereon. He also admitted his insolvent condition from the time of his arrival in St. Joseph up to the time of filing his answer, and of his carrying on business in his wife's name, but denied that this was done to defraud his creditors, etc. The answer of the defendant, Mary A. Ashbrook, was of similar purport to that of her husband; and she admits that she knew that he was embarrassed and was using her name, both in the sign over his store, and also in buying goods, etc; but that she protested against such use of her name, etc., etc. The new matter of these answers was denied.

The court, upon hearing the testimony, gave judgment for the recovery of the plaintiff's debt, and decreed a sale of the property mentioned in the petition; but directed that such sale should be subject to a deed of trust executed by the defendant to secure Adam Flesher and others on a debt of the husband, and that out of the proceeds of such sale should be paid, first to the wife the sum of $3,000, then to the husband $1,000, for his homestead, and then that the plaintiff's debt should be satisfied.

The will referred to in the answers of the defendants, bequeathed eighty acres of land in Hocking County, Ohio, to

the defendant, Mary A. Ashbrook, with the request that if sold its proceeds might be invested in her name; and by another clause of the will the proceeds of 116 acres of land in Fairfield county, in the same State, after certain deductions, were devised to her, with the request that the proceeds be invested in the name of Mrs. Ashbrook and her children alone. This will was that of James Chambers, the father of Mrs. Ashbrook; was probated in Ohio, and her husband was the executor.

Treating the precatory words of the will as words of command, there can be no doubt that it was the duty of the executor to have re-invested the proceeds of the sale of the Ohio lands in other real estate, in conformity to the terms of the will; and that such real estate, when thus purchased, whether from the proceeds of the eighty acre or one hundred and sixteen acre tract, would be exempt from sale for the debt of the husband. Because the proceeds of the last named tract, when re-invested, as desired by the will, would have been the separate property of the wife for life, with remainder to her children. And it is equally certain, that land purchased out of the money arising from the sale of the tract first named, being conveyed in the name of the wife, would vest the fee in her, and would also be exempt under that section of our law respecting married women, which prohibits the sale of land acquired by the wife prior to marriage or during coverture, by gift, grant, devise or inheritance, for the satisfaction of the sole debts of the husband. (Wagn. Stat., 935, § 14.) And the prohibitions of this section apply as well to lands conveyed to the wife in the ordinary way, as to those settled with more formality, to her sole and separate use. (Hale vs. Coe, 49 Mo., 181.)

I do not feel warranted, after a careful perusal of the evidence, in arriving at the conclusion that the wife is justly chargeable with any complicity in the fraud alleged against herself and husband. But on the other hand, I have been unable to resist the belief, or avoid the impression which that evidence has produced upon my mind, that it was the

settled intention and persistent design of the husband, manifested during a series of years, and, in a variety of ways, not necessary to detail here, to baffle his creditors, by doing business, signing notes and taking conveyances, in the name of his wife. And the court below evidently arrived at the same conclusion when it decreed the sale of the land sought to be subjected to the payment of plaintiff's debt.

I cannot, however, fully concur in the result reached in that decree, in so far as it postponed the demand of the plaintiff to the incumbrance of those who were not parties to the suit, and were not in any manner making any assertion of their rights, and in so far as it ordered the payment to the wife of $3,000.

There would appear to be no error in allowing to the husband a certain sum for the purchase of a homestead, nor in decreeing that this amount should have priority over plaintiff's claim; because, notwithstanding the evident designs which he entertained towards his creditors, this could not deprive him of the benefits conferred by the law as to all debts except those contracted prior to its passage; and the debt in question was not contracted until December, 1st, 1866, long after the passage of the law which exempted homesteads from execution. And although the designs of the husband were very apparent in respect to his creditors, this should not be allowed to prejudice the rights of his wife under the terms of her father's will. But while it is undoubtedly true that a court of equity will throw safeguards around, and see to the proper application of a trust fund, and will follow it so long as it can be clearly and distinctly traced, yet it is equally true that when the means of its identification fail, the powers of the court in reference to that fund must also cease. (2 Sto. Eq. Jur., §§ 1210, 1258-9; 3 Sugd. Vend., 270, 272, and cases cited.)

And just here the chief difficulty in this case arises; it being impossible to trace the trust fund with anything like satisfactory certainty, and the testimony of Ashbrook himself sheds but little, if any, light upon the subject, and he of all

other persons, ought to be capable of conveying direct and positive information in reference to this matter. In regard to the use of the funds entrusted to him as executor, his own testimony is, that he used "part in business, part in improvements, and part in the purchase of the lots in controversy." Such statements are by far too indefinite to form the basis of a decree allotting the lands in question to the use of the wife, or of creating a charge thereon for her benefit, to the extent of the trust fund misappropriated. In addition to this, the meager and unsatisfactory testimony of the husband is contradicted by his admissions to Carter, and indeed by all the facts and circumstances of the case; and no explanation of even a plausible nature, is afforded of the singular correspondence which existed between the rapidly increasing indebtedness on the one hand, and an equally rapid acquisition of real estate in the name of the wife on the other.

The judgment will be reversed and the cause remanded; Judges Vories and Hough not sitting; the other judges concur.

ANTON BISSIG, Appellant, *vs.* WM. BRITTON, Respondent.

1. *Frauds, statute of—Promise of indemnity to surety within.*—A verbal promise made to a surety upon a replevin bond to hold him harmless against any damages incurred by reason of the premises, is a promise to answer for the default of another, viz: the principal in the replevin bond, and so is within the statute of frauds, (Wagn. Stat., 656, § 5) and not binding.

Appeal from Buchanan Circuit Court.

Murat Masterson, for Appellant, cited the following authorities: Thomas vs. Cook, 8 Barn. & Cr., 728; (*Contra* Green vs. Cresswell, 10 Ad. & El., 453) Cripp vs. Hartman, 10 Jur. N. S., 200; Chapin vs. Merrill, 4 Wend., 657; 5 Greenl., 304; Smith vs. Sayward, "Thorp Val. Verb. Ag.," §§ 438 to 478; Lucas vs. Chamberlain, 8 B. Mon., 276; Holmes vs. Knight, 10 N. H., 175.

Fred. Ledergerber, for Appellant.

I. Where the promisor and promisee are about to unite in an instrument of writing, as sureties for a third person, the promise to indemnify is not within the statute of frauds (12 N. Y., 462; 10 Barb., 512; 4 Hurls. & N. Eq., 738; 8 Barn. & C., 15 Eng. C. L., 739; 22 Pick., 97; 1 Kelly's Ga., 294; 8 B. Mon., 378; 13 *Id.*, 369; Thorp Val. Verb. Ag., p. 484, § 474; 23 Mo., 207); because, (*a.*) this was an original promise. (See authorities above cited; 10 N. H., 175; Troop, § 460; 20 Pick., 470; 4 Wend., 657; 22 *Id.*, 101; 31 Wis., 312, 313 op.; 1 Pet. U. S., 500; 9 Gray, 77; 10 Johns., 243; 12 Mass., 300; Thorp Val. Verb. Ag., 485, § 476; 21 Mo., 373; 1 Bond U. S. C. C., 506.) (*b.*) Between these parties the real transaction may be shown by parol. (10 Barb., 512; 12 N. Y., 467; 4 Hurls. & N., 739; 14 Ves., 169; 11 Ia., 317; 5 B. Mon.; 13 *Id.*, and authorities above cited; 21 Mo., 573; 9 Mo., 125; 23 Mo., 140, 207; 18 Mo., 74; 20 Mo., 571; 35 Mo., 282.)

C. A. Mossman, for Respondent.

The question must be determined by the agreement, (Glenn vs. Lehnen, 54 Mo., 53) and hence the court will look at the situation and intention of parties. (Garner vs. Hudgins, 46 Mo., 399; 3 Pars. Cont., 5 ed., p. 20.) Respondent's undertaking was that the suit should be duly prosecuted, and that the property in Wisner's possession should be returned on order of court, and all damages and costs against Wisner should be paid. Only on Wisner's default could appellant be harmed. Wisner is originally liable and respondent only collaterally so. (White vs. Solomonsky, 30 Ind., 590; 2 Pars. Cont., 9; Easter vs. White, 12 Ohio St., 219.)

If respondent's contract was original it must be supported by an original consideration between the promisor and promisee, and be beneficial as to the former. (Furbish vs. Gardener, 98 Mass., 296; Brown Fr., 204–9.) A simple detriment to the promisee will not be enough. (2 Pars. Cont.,

10; Nelson vs. Boynton, 3 Md., 396; Baker vs. Bucklin, 2 Den., 45; Kingsley vs. Balcome, 4 Barb., 131; Cook vs. Elliott, 34 Mo., 587; Garner vs. Hudgins, 46 Mo., 403 of opinion.)

A promise to indemnify is within the statute. (Garner vs. Hudgins, *supra;* Green vs. Cresswell, 10 Ad. & El., 453; Easter vs. White, *supra.*)

Here when the promise was made, the bond was not signed by appellant. Respondent never agreed to be bound unless the sureties signed, and was not bound until then, unless contingently; and this is not sufficient to take the case out of the statute. (Brown Fr., § 164; Suydam vs. Westfall, 4 Hill. 211; 7 Har. & J., Md., 391; Thorp Val. Verb. Ag., § 496.)

Barry vs. Ransom, (12 N. Y., 462) is not an authority. The question whether prisoner was bound at the time of making the promise, was not discussed.

WAGNER, Judge, delivered the opinion of the court.

This was an action upon a verbal promise made by the defendant, to hold the plaintiff harmless from all damages arising by reason of plaintiff signing, as surety, a replevin bond for John A. Wisner and others, they being about to commence an action for the recovery of personal property before a justice of the peace.

The petition alleged that defendant had already signed the bond as surety, and that in order to make it good he requested plaintiff to sign it also, promising at the time that he would hold plaintiff harmless from all damages arising therefrom, and from all liabilities incurred on account thereof, and that if any money was ever required to be paid in consequence of the undertaking, that he would pay it himself; that plaintiff signed the bond solely upon that consideration, promise and agreement. There was then an averment that judgment was rendered against Wisner and others, and their bondsmen, and that the property replevied was not returned, and that an execution was issued against them, which defendant refused and neglected to pay, and which plaintiff was compelled to satisfy in full.

These averments were denied in the answer, but the only defense relied on at the trial, was, that the promise was within the statute of frauds, and not being evidenced by any writing was therefore void. This defense was sustained by the court below, and the plaintiff appealed.

The 5th section of the act in relation to frauds and perjuries, declares that "No action shall be brought to charge any executor or administrator upon any special promise, to answer for any debt or damage out of his own estate, or to charge any person upon any special promise to answer for the debt, default or misconduct of another person * * * * * * unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereto lawfully authorized." (Wagn. Stat., 656.)

This section of our statute is mainly a transcript of the English statute of frauds and perjuries, and it is therefore important to examine the English cases, and ascertain how it has been construed there in doubtful cases. There, as in this country, it was for sometime involved in uncertainty as to whether contracts or promises of indemnity, as exhibited in this record, were to be regarded as coming within the provisions of the statute; but the settled rule of construction now seems to be that the statute applies.

The cases proceed upon the theory that where there is an implied liability on the part of a third person to reimburse the plaintiff, or remunerate him for the damages or loss suffered on his, such third person's, account, the promise of the defendant, in an action upon an alleged undertaking to indemnify the plaintiff, is an undertaking collateral to the implied liability of such third person, and so falls within the statute, and must be in writing and signed by the defendant, or some one by him authorized to sign the same.

The earliest case in which this question was raised, was Winckworth vs. Mills, (2 Esp. N. P., 483.) decided at *nisi prius*. There one Taylor made a promissory note to the de-

fendant, who indorsed it to another, who indorsed it to the plaintiff, and he having lost the original note, applied to the makers, who made a difficulty about paying it; whereupon the defendant verbally promised to indemnify the plaintiff if he would endeavor to enforce payment from the maker. The action was in part to recover expenses incurred in such endeavor, and Lord Kenyon ruled that as to that part which was based on the promise to indemnify, the plaintiff could not recover, because it was a promise to answer for the debt and default of another.

In Thomas vs. Cook, (8 Barn. & Cr., 728) a different doctrine was announced. In that case the plaintiff, at the request of the defendant, executed a bond with him and another, to save harmless a third person from the claims upon an old firm in which he had been a partner, and the defendant verbally promised the plaintiff to save him harmless for executing the bond, and the court decided that the defendant's promise, being merely to indemnify, was not within the statute. Bayley, J., saying, that in his opinion, "a promise to indemnify did not fall within either the words or the policy of the statute of frauds;" and Parker, J., said: "This was not a promise to answer for the debt, default or miscarriage of another person, but an original contract between these parties, that the plaintiff should be indemnified against the bond."

But in the subsequent case of Green vs. Cresswell, (10 Ad. & El., 453) in the same court, the case of Thomas vs. Cook was overruled. There the declaration stated that John Reay had sued Joseph Hadley by *capias*, on which Hadley had been arrested; and in consideration that the plaintiff, at the request of the defendant, would become bail for Hadley upon the *capias*, the defendant promised to indemnify him; but Hadley did not put in special bail, whereby, etc. At the trial the plaintiff had a verdict; but as the pleadings showed that the promise was verbal, a rule *nisi* to arrest the judgment was obtained, which the court after argument made absolute. Lord Denman, C. J., in delivering the opinion of

the court, said: "The promise in effect is, 'If you will become bail for Hadley, and Hadley, by not paying or appearing, forfeits his bail bond, I will save you harmless from all the consequences of your becoming bail. If Hadley fails to do what is right towards you, I will do it instead of him. If there had been no decision on the subject it would appear impossible to make a reasonable doubt that this is answering for the default of another.'" He then referred to Thomas vs. Cook, and added, "But the reasoning in this case does not appear to us satisfactory in support of the doctrine there laid down, which taken in its full extent would repeal the statute. For every promise to become answerable for the debt or default of another may be shaped as an indemnity; but even in that shape, we cannot see why it may not be in the words of the statute, within the mischief of the statute it most certainly falls. A distinction was also hinted at from the circumstance of Hadley's debt being due to a third person, and the default therefore incurred towards him, not towards the bail. But here again is the surmise of an intention in the legislature which none of its language bears out; and besides, may it not be said that the arrested debtor who obtains his freedom by being bailed, undertakes to his bail to keep them harmless by paying the debt or surrendering."

This case has ever since been considered the established law in England. In the last reported decision on the subject (Cripps vs. Hartwell, 2 Best & Smith, 697) the case showed that one Sarah Elliott, the daughter of the defendant, had been committed to plead to an indictment against her for a misdemeanor, and to be further dealt with according to law; and being so committed, the defendant requested the plaintiff to become bail for her, and to enter into certain recognizances for her appearance; and the defendant agreed, in consideration thereof, to indemnify the plaintiff against all liability in respect thereof, and from all costs, damages and expenses in respect to the same. Sarah Elliott did not appear according to the conditions of the bond, and the same became estreated; and the plaintiff was compelled to pay

a certain sum in consequence thereof. On the part of the defendant it was objected that the case was within the statute of frauds, and of this opinion was the court. Green vs. Cresswell was quoted as decisive authority, and the judgment for the defendant was made absolute.

In the American States great contrariety on the question exists. In New York and Maine in an early day, Thomas vs. Cook was followed, and it was held that where the defendant promised to hold the plaintiff harmless against the consequences of his signing at his request a writing for the benefit of a third person, the promise was in the nature of an original undertaking and not within the statute. (Chapin vs. Merrill, 4 Wend., 657; Smith vs. Sayward, 5 Greenl., 504.) And upon the authority of the cases just cited, the rule has been announced in Georgia and Kentucky, that promises to indemnify are not within the statute of frauds. (Jones vs. Shorter, 1 Kelly, 294; Dunn vs. West, 5 B. Mon., 382; Lucas vs. Chamberlain, 8 *Id.*, 276; Jones vs. Letcher, 13 *Id.*, 363.) Such is also the law in New Hampshire. (Holmes vs. Knights, 10 N. H., 175.) But the courts of both North and South Carolina and Alabama repudiate this rule, and hold these verbal promises to be clearly not binding, if collateral to any implied liability on the part of a third person. (Draughan vs. Bunting, 9 Ired., 10; Simpson vs. Nance, 1 Spears, 4; Brown vs. Adams, 1 Stew., 51.)

Since the decision in Green vs. Cresswell, the New York courts have overruled Chapin vs. Merrill, and conformed their adjudications to the English rule. In the case of Kingsley vs. Balcome, (4 Barb., 131) an action was brought by the plaintiff to recover damages of the defendant, upon his undertaking or promise to save the plaintiff harmless from all damages by reason of his becoming bail for a third person, the plaintiff having in consideration of such promise become bail and been indemnified. It was held by the court, that a valid contract must not only be proved to have been made, but the same must be shown to have been in writing, and signed by the defendant, or by some one by him duly author-

ized to sign the same. Mr. Justice Sill, in delivering the opinion of the court, refers to the contrary holding in the case of Chapin vs. Merrill, (4 Wend., 657) and says: "The court there correctly lay down the principle controlling this class of cases. When the promise is an original, absolute promise, it is not within the statute; otherwise, if it is collateral to the promise or undertaking of another;" but he denies the correct application of the principle in that case. And the court expressly declare that it is not sufficient that the promise arise out of some new and original consideration of benefit or honor moving between the newly contracting parties, but that this new original consideration spoken of must be such as to shift the actual indebtedness to the new promisor, so that he must be bound to pay the debt as his own, the original debtor standing to him in the relation of surety. Other cases in that State are to the same effect. (Farley vs. Cleveland. 4 Cow., 432; Carville vs. Crane, 5 Hill., 483; Barker vs. Bucklin, 2 Den., 45.)

The case of Easter vs. White, (12 Ohio St., 219) was elaborately and ably considered, and is identical with the case we are now reviewing. Easter, the plaintiff, brought an action against Eliza J. White, the defendant, stating in his petition in substance, that he, at the request of the defendant, and upon her promise to indemnify him against any loss in so doing, became a surety for one McDonald, in an undertaking in replevin; and that in an action against him on such undertaking, he was subjected to damages which he had been compelled to pay; and that the defendant refused to fulfill her promise of indemnity. One of the defenses was, that the defendant made no promise in writing, to indemnify the plaintiff for becoming surety in the undertaking in replevin. The court after a most exhaustive discussion of the whole question, held the defense a good one, and decided that the promise was clearly within the statute of frauds, and not being in writing, was not binding on the defendant.

The earlier cases holding that the promise is not within the statute of frauds are cited and condemned by Brown on

Frauds, who expresses the opinion that they cannot be sustained by any just interpretation of the statute. (Brown on Frauds, §§ 159–60–61.)

Now the question to be determined in arriving at a correct conclusion, is whether the promise amounts to an original undertaking and is supported by a direct consideration, or whether it is collateral in its character, and depends upon some act to be omitted or performed by some third person. It is true there is some plausibility in the argument, that where a request is made by one person to another, to sign an instrument as surety for the benefit of a third party, and at the same time the person agrees to indemnify and save the surety harmless, and the surety becomes bound with that understanding, that it is an original promise founded upon a sufficient consideration. But the agreement of the surety is not to incur any liability for the person making the request, but to be responsible for a third party's acts, which makes it an undertaking collateral to the original promise.

The case here presents a verbal promise by the defendant, to indemnify the plaintiff against any loss by becoming surety for Wisner, and others, as principal in an undertaking by them executed in a replevin proceeding. The bond which the plaintiff was to be indemnified for becoming surety upon, was under the provisions of the law, that the plaintiffs in that action, the principals, should duly prosecute the proceedings in replevin, and return the property if the same was adjudged to be returned, or to pay the damages and costs awarded. Therefore, the defendant's promise to indemnify the plaintiff against any loss in so becoming surety, would surely seem to be a promise to answer for the default of others, that is, the default of Wisner and others, the principals in the bond or undertaking. The very consideration of the bond upon which plaintiff became surety was such that the plaintiff could only become liable to pay anything by reason of signing the same as surety, upon Wisner and others making default in the return of the property or in the payment of the damage and costs adjudged against them.

The principal is always liable to remunerate his surety for all moneys paid in his behalf, and if the promise be regarded as one to make good by repayment any loss incurred as surety for Wisner and others, still it would only amount to an undertaking that if Wisner and others should be in default in remunerating the plaintiff as their surety, that the defendant would, in Wisner's and others' stead, answer for their default by saving the plaintiff from such loss.

In whatever aspect the case is presented, we can construe it in no other light than that the obligation of suretyship entered into by the plaintiff was to be a responsibility for the default of other persons, to-wit: Wisner and others; and that, therefore, the promise of indemnity made by the defendant was within the statute of frauds, and being verbal, must be held incapable of enforcement.

This question has never before been directly presented in this court, and we are now to pass upon it for the first time. And we think that upon both authority and reason the promise comes clearly within the provisions of the statute. With this view the judgment must be affirmed; all the judges concur.

EPHRIAM MCGLOTHLIN, Adm'r of the estate of WALTER MOORE, deceased, *et al.*, Respondents, *vs.* JAMES HEMRY, Ex'r of REZIN HEMRY, *et al.*, Appellants.

1. *Witness acts—Transactions with administrator touching deed of trust by deceased.*—In proceedings to set aside a deed of trust given by one deceased to defendant, the latter is a competent witness as to transactions with the administrator relating thereto, subsequent to the decease.

Appeal from Caldwell Circuit Court.

Low & McFerran, for Appellant.

Hoskinson, Dunn & Donaldson, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

Proceedings to redeem lands sold under a deed of trust. The charge was made in the petition, that a large portion of

the debt secured by the deed arose from the accumulation of usurious interest, which had been incorporated in the notes, as they from time to time matured; that $600, being almost the entire sum due, at ten per cent. interest, from the inception of the debt, had been paid shortly before the sale, and $200, an amount far in excess of the sum justly due, tendered in satisfaction of the claim; that in fact only $33.19 was actually due; that notwithstanding this tender, the sale took place, etc., etc.

The answer denied the chief allegations of the petition. The court found that a large portion of the debt secured by the deed of trust was composed of illegal interest; but found, also, that after deducting such interest, the sum of $938 was still due.

A decree was then entered, setting aside the sale, and granting two years in which to redeem the land sold. There was no evidence on which to base this decree, as none of the witnesses knew or pretended to know anything in regard to the consideration of the note in controversy, and to enforce the payment of which, the sale took place.

There is no doubt from the evidence, that some of the prior transactions between Moore and Hemry were tainted with usury; but there is nothing in the testimony to connect those transactions with the one now before us. The alleged agreement to postpone the sale under the deed of trust until the administrator of Moore could realize a certain sum out of the sale of the personal property of the estate, if he would pay $600 of the debt, was altogether too indefinite. If such agreement could be binding, the sale by the trustee might never take place. Besides, the agreement does not seem to have been supported by any consideration; and apparently at the same time when the $600 was paid Hemry refused to postpone the sale.

The idea seems to have prevailed at the trial, that the defendant was not a competent witness. He was clearly competent as to matters occurring between him and the administrator, subsequent to the death of Moore.

Because the evidence does not warrant the decree, and in order that the matters in issue may receive a more thorough and satisfactory investigation, the judgment is reversed and the cause remanded. Judge Vories did not sit; the other judges concur.

JAMES BATTEL, Appellant, *vs.* WILLIAM H. CRAWFORD, Respondent.

1. *Pleading—Trover and conversion—Demand and refusal—Allegations and proof as to.*—In suit for conversion of money, the petition is not fatally defective for not alleging in direct and positive terms that defendant wrongfully converted the money to his own use, where these facts substantially appear in the pleading. And where the conversion is alleged, it is unnecessary to allege demand of payment and refusal. And they need not be proved where failure of demand is not set up in the answer.

Appeal from Caldwell Circuit Court.

Hill & Carter, for Appellant.

Hall & Johnson, with Murat, for Respondent.

HOUGH, Judge, delivered the opinion of the court.

The question presented by the record in this cause for the consideration of the court, is the sufficiency of the following petition: "Plaintiff states, that on or about the — day of ———, 1864, he made defendant his agent, to safely keep and preserve for him in defendant's iron fire and burglar proof safe or otherwise, plaintiff's money; that plaintiff thereupon, then and there deposited with and delivered to defendant, as on special deposit for said purpose, the sum of $218.50; that defendant then and there received of plaintiff said sum of money, and undertook and agreed to keep and safely preserve the same as aforesaid for plaintiff, and was to return the same to plaintiff, whenever thereafter requested by plaintiff so to do; that soon thereafter, defendant, for the purpose of deceiving and misleading plaintiff, and of pre-

venting plaintiff from the commencement of an action against him for the recovery of said money, did deceitfully, falsely and fraudulently state and represent to plaintiff and divers other persons, that he, said defendant, had been robbed by rebels and bushwhackers of said money belonging to plaintiff, and of divers other sums of money so and in like manner deposited with him by other persons; that plaintiff relied and acted upon the said false and fraudulent statements and representations, and did not discover their falsity until on or about the beginning of the year 1870, when plaintiff discovered that said defendant had not been robbed, as was stated and represented by defendant, but that he, said defendant, had wrongfully converted said money to his,—defendant's—own use and benefit. Wherefore plaintiff asks judgment against said defendant for the said sum of $218.50, and the interest thereon at ten per cent. per annum, from the — day of ——, 1864, and costs of this action."

To this petition the defendant answered with a general denial, and a plea of the statute of limitations, to which plea of the statute the plaintiff replied.

At the trial defendant objected to the introduction of any evidence by the plaintiff, for the reason that the petition did not state facts sufficient to constitute a cause of action, which objection was by the court sustained, and all testimony offered by the plaintiff was excluded; to which ruling of the court plaintiff excepted, and thereupon took a non-suit with leave to move to set the same aside; and after an unsuccessful motion for that purpose, brings the case here by appeal.

It is objected here, that the petition is fatally defective in not alleging in direct and positive terms, that the defendant had wrongfully converted the money to his own use, and also in failing to allege any demand and refusal. The petition is extremely inartificial, but it contains the substance of a good complaint. The conversion by the defendant of the special deposit is substantially alleged; and while the petition is lacking in formality and precision, yet in view of the duty imposed by statute to distinguish between form and

substance, we think we would be manifesting a fastidious regard for exactness in pleading, without precedent since the adoption of the code, were we to turn the plaintiff out of court on this point.

As to the second point, when conversion is in terms alleged, it is unnecessary to allege a demand and refusal, though the defendant may have become lawfully possessed of the property converted. Evidence of demand and refusal may be necessary to establish the conversion, but it is not necessary to plead the evidence. If it were, the defendant is in no position to make the objection to the want either of such allegation or proof, as he has not alleged in his answer any want of demand. (Wagn. Stat., 347, § 34; Lee vs. Casey, 39 Mo., 383; Westcott vs. Montreville, 30 Mo., 252; Reid vs. Mullins, 43 Mo.. 306; Raithel vs. Dezetter, 43 Mo., 145; Fisher vs. City of St. Louis, 44 Mo., 482.)

The further point is made, that there is no bill of exceptions in this case; and that we cannot, therefore, review the rulings of the court below. We find a bill of exceptions as a part of the transcript here marked as filed, and we see no reason for rejecting it as a part of the record.

The Circuit Court erred in refusing to permit the plaintiff to introduce evidence under his petition, and its judgment is therefore reversed and the cause remanded; the other judges concur.

ISAAC LILLIBRIDGE, Respondent, *vs.* JOHN A. ROSS, *et al.*, Appellants.

1. *Partition—Person joined as plaintiff without consent may have sale under set aside.*—Where one is joined as co-plaintiff in a partition suit without his consent, he may sue in equity to set aside judgment and sale thereunder. The case is distinguishable from one where suit is brought to set aside a judgment in partition by plaintiff, who was not a party to the former suit. (See Peak vs. McLaughlin, 49 Mo., 162.) In the latter instance, he is not bound by the record under any circumstances. In the former, he cannot attack it collaterally.

Appeal from Andrew Circuit Court.

Heren & Rea, for Appellants.

I. The case of Peak vs. Laughlin, (49 Mo., 162.) is a case directly in point and settles this case. Lillibridge's rights in this case were no more effected by Ross using his name without his knowledge or consent, than if his name had not been used at all in the partition suit. In either case the decree and sale under it were void as to him, and he could successfully attack them in any collateral proceeding. (Smith vs. Ross & Strong, 7 Mo., 463; Galahan vs. Gates, 20 Mo., 236; Edgell vs. Sigerson, 20 Mo., 494; Smith vs. McCutchen, 38 Mo., 417; Higgins vs. Peltzer, 49 Mo., 152; 15 Johns. [N. Y.], 121.)

Bennett Pike, with J. D. Strong, for Respondent.

The case of Peak vs. Laughlin (49 Mo., 162), is clearly distinguishable from the case at bar. In that case, the party seeking relief, had not been party to the partition suit and proceedings, and was not affected by them. But plaintiff here was unwittingly a party, and could not assail the judgment collaterally.

Wagner, Judge, delivered the opinion of the court.

This was an equitable proceeding to set aside a judgment rendered in partition and a sale made thereunder.

It was alleged in the bill in substance that the plaintiff and some of the defendants were owners, as tenants in common, of a piece of land, and that defendant, Ross, caused a suit in partition to be brought and a decree rendered for the sale thereof, and that the same was sold without any notice, legal or otherwise, having been given to plaintiff, and that plaintiff had no knowledge thereof, until he ascertained the fact after the sale, and that the decree was procured by the fraudulent acts of the defendant Ross.

The court below gave judgment in accordance with the prayer of the petition, set the decree in partition aside, and adjudged the sale under it to be void.

We think the evidence fully warrants and sustains the action of the court. The facts are that Ross, without any knowlege or authority from the plaintiff, instituted the proceeding for partition, in which he joined the plaintiff here as a co-plaintiff with himself. The evidence strongly tends to establish that this was done to keep plaintiff in ignorance, and prevent his offering any resistance. As he had no authority for joining him as a plaintiff, he ought to have made him a defendant, but in that event, notice would have been necessary, and the purpose had in view would probably have been defeated. As it was, the plaintiff was not advised of either the suit or the sale, till after it had taken place and his property was sold for less than half its value.

But the counsel for the defendants insist, that, if we should be of the opinion that the evidence established the fact that the judgment in partition was obtained by fraud, still the plaintiff cannot maintain this suit, that, if fraudulent, it is simply a nullity, and that his rights were not impaired. For this position, Peak vs. Laughlin (49 Mo., 162), is cited and relied on. But that case is clearly distinguishable from this. There the suit was brought to set aside a judgment in a partition case were the plaintiffs were not parties. As they were not parties to the proceeding, their rights were not concluded or bound by the record, and there was nothing to prevent the assertion of their interest wherever it might be drawn in question. But here the case is otherwise. The judgment and the deed, made at the sale in pursuance thereof, casts a cloud upon the plaintiff's title. As the judgment is fair upon its face, and the plaintiff appears as a party thereto, he could aver nothing against it in a collateral proceeding, and his only effectual remedy is to set it aside by a direct proceeding instituted for that purpose.

As the case stands, by a fraudulent contrivance, the plaintiff has been deprived of his rights without ever having had his day in court. This is contrary to the fundamental principle that hearing should always precede condemnation. As

the judgment was fraudulently obtained, it was rightfully set aside, and the sale made by virtue of its authority necessarily fell with it.

Judgment should be affirmed, the other judges concurring.

DAVID D. MILLER, Defendant in Error, *vs.* JAMES A. GILLESPIE, Plaintiff in Error.

1. *Sureties on administrator's bond—Action for contribution between—Discharge in bankruptcy—Res adjudicata, etc.*—The discharge in bankruptcy of a surety on the bond of an administrator, will release him from liability for contribution to his co-surety, who has been compelled to pay the administrator's debt. The surety occupied no fiduciary relation though his principal did. But the fact that the administrator, with the surety and co-surety, were jointly sued on the administration bond, and that the discharge having been pleaded, the case was dismissed as to the surety, will not be held *res adjudicata*. Both plaintiff and defendant, in the suit for contribution, were defendants in the previous action, and did not occupy a hostile position towards each other, and the question of contribution was not raised between them.

Error to the Clay Circuit Court.

D. C. Allen, for Plaintiff in Error.

I. No contribution can arise save where there is mutual and equal obligation. Gillespie and Miller were not jointly bound to pay the judgment wherein they were defendants. (Wagn. Stat. [Ed. 1872], 71, § 3; Pickering vs. Mississippi Val. Nat. Tel. Co., 47 Mo., 457; Langford vs. Sanger, 40 Mo., 160; House vs. Powell, 45 Mo., 381; Syme vs. Str. Indiana, 28 Mo., 335; Freem. Judg., 89, § 120; Jones vs. Fuller, 38 Mo. 363; Biddle vs. Boyce, 13 Mo., 532; 1 Par. Cont., 31, § 3 [Ed. 1864,] *et seq.*; Labeaume vs. Sweeney, 17 Mo., 153.)

II. In the case of the State *ex rel.* Clark v. Long, the judgment in favor of Gillespie and against his co-defendants was conclusive between all parties to the cause, and destroyed any right of contribution as between Miller and Gillespie, if any ever existed. Miller rested satisfied with that judgment

and did not seek to reverse it. If he was not satisfied, he should have appealed or sued out his writ of error. (Par. Cont., *supra;* Freem. Judg., 125, § 154; Offutt vs. John, 8 Mo., 120; Ridgley vs. Stillwell, 27 Mo., 128.)

Samuel Hardwick, for Defendant in Error.

I. It is only between opposing parties that matters are finally determined, and the judgment is binding. (Freem. Judg., § 158; Buffington vs. Cook, 35 Ala., 312; McCrary vs. Park, 18 Ohio St. 1.)

II. A judgment is not binding on any one, unless he has a right to sue out a writ of error or take an appeal. (Leonard vs. Bryant, 11 Met. [Mass.], 370; Downs vs. Fuller, 2 Met. [Mass.], 135; Gilbert vs. Thompson, 9 Cush. [Mass.], 348; Bacon's Abridgement, Title Error, B.) As to Gillespie, the plaintiff could have dismissed as to him or agreed to a judgment in his favor, and Miller had no right to complain. (1 Wagn. Stat., 269, § 4.)

III. The debt was created while the administrator with his sureties was acting in a fiduciary capacity—to execute a will. In such case bankruptcy affords no discharge. (See Bump Bankr., 4 Ed., 439, § 33.)

Napton, Judge, delivered the opinion of the court.

This suit is by a surety on an administration bond to recover of a co-surety one-half of the money the plaintiff paid on a judgment against the administrator and himself as surety.

The defense is that in a suit against the administrator, and the plaintiff and defendant who were his sureties, the defendant pleaded bankruptcy, and his plea was adjudged good and he was therefore discharged from all liability to the plaintiff in that action; and this judgment is relied on as *res adjudicata* in the present action.

On the trial, the proof was clear that the plaintiff paid the debt of the administrator, for whom Gillespie was surety, and this was all the proof offered by plaintiff.

Whether Gillespie's discharge in bankruptcy will operate to discharge him from liability against a suit by his co-surety on an administration bond, is a question not raised in the case.

This question was decided in the case of Jones & Cullom vs. Knox (46 Ala., 53), and we think rightly. The discharge operated to release the defendant Gillespie from all his liabilities, except such as arose from a fiduciary relation; but the surety occupied no fiduciary relation to any one, though the principal did.

In the case of Halliburton vs. Carter, (55 Mo., 435) this view is conceded; and, therefore, though a discharge of the principal would not release the sureties, a discharge of the surety, under the bankrupt law, will be a bar to any action based on such liability.

But it will be observed, that the petition in this case, alleged a bond, a suit on it by certain persons in the name of the State, a judgment in such suit, and a payment by plaintiff of the entire amount, and, therefore, he asks for contribution. The defendant first denies all the allegations of the petition, and then sets up the judgment in the case of State to use of Clark vs. Miller and others, as a *res adjudicata.*

This judgment, thus pleaded, had no bearing on the case. It was not between the parties to the present action. Both the plaintiff and defendant, in this suit, were defendants in that, and did not occupy a hostile position to each other; nor was any question of contribution between them involved or determined. The plaintiff had a right to dismiss as to Gillespie; nor had Miller any right to an appeal or writ of error to reverse the judgment in favor of Gillespie. (Freeman on Judgment, § 158.)

But the plaintiff in this case, offered no proof of any bond, and the allegations of the petition being all denied, he made out no case; nor did the defendant plead bankruptcy or offer any proof on the subject.

The judgment must be reversed and the case remanded; the other judges concur.

William H. Meyers, Respondent, *vs.* The Chicago, Rock Island & Pacific Railroad Company.

1. *Railroads—Damages—Breaking down of vehicle on track which is out of repair—Instructions touching negligence—Want of proper care.*—In suit against a railroad company for damages to plaintiff's vehicle where it appears that the track was out of repair, and in consequence, the wagon broke down, and in that condition was run into by the train and that the state of the road was known to plaintiff at the time, it is proper to submit to the jury the question whether under the circumstances plaintiff was guilty of negligence and also what care and caution he was bound to exercise.
2. *Railroad—Damages—Contributory negligence directly causing accident—Liability determined by.*—In suit for damages against a railroad where the negligence of plaintiff contributes directly to cause the accident, they will find for defendant. But on the other hand, although plaintiff is guilty of negligence, if the injury is the direct consequence of the negligence of the company it will be held.
3. *Instruction, to cause reversal, should mislead.*—An instruction not calculated to mislead a jury, although obscure or useless, will not work a reversal of the cause.
4. *Railroads—Damages—Exercise of care by defendant—Want of, will render company liable.*—Although plaintiff in a suit for damages against a railroad company is guilty of contributory negligence, yet if the agents having charge of the train could have avoided the injury by the use of ordinary care and caution defendant will be liable.
5. *Although various instructions must be taken together to learn the law of the case, no ground for reversal when.*—Where instructions taken as a whole series applying to all the phases of the case, fairly present the law to the jury, and are not calculated to mislead, the judgment will not be reversed on the ground that they are not combined in one declaration.
6. *Instructions, law of case fully presented by others—May be refused.*—Where instructions given, fully declare the law of the case, it is not error to refuse others, although correct.

Appeal from DeKalb Circuit Court.

J. H. Shanklin & M. A. Low, for Appellants.

I. The plaintiff admitted that the crossing was dangerous, and that its condition had been known to him for four weeks. And while ordinarily the presumption is, that in doing a particular act, the party doing it acted with due care, yet, where one attempts to do an act which he knows to be attended with risk and danger, he must show affirmatively that he conducted himself with prudence and discretion. (Fox vs.

Town of Glastonbury, 29 Conn., 204; Butterfield vs. Forrester, 11 East., 61; Horton vs. Ipswick, 12 Cush., 488; Devitt vs. Pacific R. R., 50 Mo., 302.)

II. The court erred in giving plaintiff's 8th instruction. Negligence being the issue in this cause, to justify a recovery, it must be a case of unmixed negligence. If both parties, by their negligence, immediately contributed to produce the injury, neither can recover. (Toledo & W. R. Co., vs. Goddard, 25 Ind., 185; Railw. Co. vs. Hunter, 33 Ind., 335; 5 Am. Rep., 201, and numerous authorities therein cited in note; Karle vs. K. C., St. Joe. & C. B. R. Co., 55 Mo., 482.)

The cases of Kennedy vs. R. R. Co., 36 Mo., 351; Huelsenkamp vs. R. R. Co., 37 Mo., 537; Morrissey vs. Wiggins Ferry Co., 43 Mo., 38, and Karle vs. K. C., St. Joe. & C. B. R. Co., *supra*, in which the whole doctrine of contributory negligence has been thoroughly examined and reviewed by this court, furnish no warrant for this instruction. The authorities, English and American, are uniform to the effect, that if plaintiff's negligence or carelessness immediately or directly contributed to produce the injury, he cannot recover.

S. H. Corn, for Respondent.

I. Instruction No. 5, given for plaintiff, is proper, and stated the law of contributory negligence correctly. (Huelsenkamp vs. Citizen's Rlw. Co., 37 Mo., 537; Morrissey vs. Wiggins Ferry Co., 43 Mo., 383; Morrissey vs. Wiggins Ferry Co., 47 Mo., 521; Brown vs. Hann. & St. Joe. R. R. Co., 50 Mo., 461; Sherm. & Redf. Negl., § 36.)

II. Instructions 8 and 9 given for plaintiff are proper. (Sherm. & Redf. Negl., § 36; Ill. Cent. Rlw. Co. vs. Middlesworth, 46 Ill. 494; Chicago, etc. R. W. Co. vs. Hogarth, 38 Ill., 370; Kerwhacker vs. Cleveland, etc. R. C., 3 Ohio St., 172.)

III. The 1st, 2nd and 6th instructions asked by defendant and refused by the court, were properly refused. The negligence on part of plaintiff which would excuse defendant, must contribute directly to cause the injury; and even then

defendant is held to the exercise of ordinary care, and it is not incumbent on plaintiff to show that the injury was willfully done. (Sherm. & Redf. Negl., § 32; West vs. Martin, 31 Mo., 375; Huelsenkamp vs. Citizen's Rlw. Co., 37 Mo., 537, *supra;* Brown vs. Hann. & St. Joe. R. R. Co., 50 Mo., 461, *supra.*)

Vories, Judge, delivered the opinion of the court.

This action was brought to recover damages for an injury done to a threshing machine of plaintiff which was accidentally on the defendant's railroad, by careless and negligent conduct of the agents and servants of the defendant, in running a train of cars against and upon said machine, by which said damage is charged to have occurred.

The petition in this case has two counts, but as the plaintiff elected to go to trial on the second count only, and the trial was had on that count, the first count need not be further noticed in the statement of the case.

It was charged by the second count that the plaintiff was the occupier of a farm in DeKalb County, Missouri, at the time of the grievances complained of, which farm is described in the petition; that the defendant was then operating and controlling a railroad, running through and over plaintiff's said farm and land, known as the Chicago & Southwestern railway; that it was the duty of defendant to construct and maintain a farm crossing over said road for the use of plaintiff; that on the 21st day of August, 1872, plaintiff was the owner of a threshing machine of the value of five hundred dollars; that plaintiff attempted to haul said machine across the track of said railroad at the crossing made on said farm, and in consequence of the negligence of the defendant in the maintenance of said crossing, the same was out of repair, and the axle of the carriage on which the machine was mounted, was thereby broken, by means of which said machine was stopped and thrown down upon said railroad, from which position the plaintiff was unable to have the same removed; that the defendant then and there, while said machine was on the

track of said road as aforesaid, willfully and negligently ran its engine and cars against and over said machine and broke and damaged the same; and that plaintiff sustained damages thereby in the sum of five hundred dollars, for which judgment is prayed, etc.

The answer to this petition does not deny that the plaintiff owned the farm and machine as charged, or that said machine was injured, or that defendant used the road and cars as charged; but it denied all other material allegations of the petition. After the denials, the answer set up by way of counter-claim what was charged to be the wrongful act of plaintiff in placing his machine on the road of defendant, by which it was damaged, etc.

To this counter-claim a replication was filed, but no other notice is taken of it in the case.

The case was tried before a jury. The evidence on the part of the plaintiff tended to prove the allegations of the petition, and that the plaintiff's machine was injured by the negligence or willful conduct of the defendant's agents and servants in conducting and operating its cars and locomotive on said road.

The evidence on the part of the defendant tended to prove that the plaintiff was guilty of neglect in getting his machine on and off the road, and in giving those conducting the train on the road timely notice that the machine was on the road.

The plaintiff's evidence tended to rebut the evidence of the defendts, attributing neglect to plaintiff.

At the close of the evidence, the court, at the request of the plaintiff, and of its own motion, instructed the jury as follows:

"4th. If, under all the circumstances in the case, the jury believe from the evidence that a man of ordinary sense and caution would have ventured to cross the defendant's railroad with the machine in proof, at the same time and place, the plaintiff's servants in charge of said machine did, and that such servant used as much care and skill in attempting to so cross said railroad as men possessed of common sense

and caution ordinarily use under like circumstances, then the breaking down of said machine on said road was the result of accident; and if the jury further believe from the evidence, that it was impracticable for plaintiff or his servants to remove said machine from the railroad track before the collision in evidence occurred, and that the plaintiff or his servants used such diligence in and about the premises as the time and circumstances would permit, to prevent the injury and to apprise the agents and servants of defendant managing the train that struck said machine—the machine being on the defendant's railroad track, then the defendant will be liable to the plaintiff, if the jury further believe from the evidence that those managing said train of cars of defendant could have prevented the said collision and injury by the exercise of reasonable care and caution.

"5th. If the jury should believe from the evidence that the plaintiff was guilty of negligence, but that his negligence was only the remote, and not the direct cause of the collision, and further believe from the evidence that the defendant's servants managing the train that struck the machine of plaintiff were guilty of negligence which was the direct cause of the collision, then the jury will find for the plaintiff the amount of damages caused by the collision.

"6th. In determining what is the direct cause of the injury, the jury may take into consideration the efficiency of the cause or agency through which the injury was done, as well as proximity in point of time and place.

"8th. If the jury believe from the evidence that those managing the train that did the injury could have prevented the collision by the exercise of reasonable care and diligence and willfully failed or neglected to do so, then they will find for the plaintiff, notwithstanding any negligence of the plaintiff.

"9th. Even if the jury do believe from the evidence that the plaintiff was guilty of negligence or carelessness which contributed to the injury; yet if they further believe that the agents or servants managing the locomotive and machinery of defendant, and with which the injury was done, might

have avoided said injury by the use of ordinary care and caution, they will find for plaintiff.

"10th. If the jury find for the plaintiff, they will assess his damages at what they believe from the evidence the property was depreciated in value by the injury done.

"11th. The court, on its own motion, instructs the jury that if they find for the plaintiff, in estimating the damages, they will exclude from their consideration all the evidence in the case touching the damage to the carriage of plaintiff, sustained in attempting to cross defendant's railroad."

To all and each of the foregoing instructions, the defend ant objected, and its objection being overruled it excepted.

The court then at the request of the defendant instructed the jury as follows:

3rd. Although the jury believe from the evidence that defendants were guilty of negligence, yet if they believe that the plaintiff or his servants in charge of the threshing machine in proof, by the exercise of common care and prudence, could have prevented the accident and injury complained of, then the jury must find for defendant.

4th. If the jury believe from all the evidence that the injury complained of was the direct result of accident or misadventure without any culpable negligence in either party they must find for the defendant.

5th. Every person of ordinary intelligence is bound to know that a railroad passing over a private crossing, is a place of more than ordinary danger, and should use at such place greater precaution to avoid accidents and injury from passing trains, than a place of less hazard.

9th. The jury are instructed that the plaintiff must establish the negligence of defendant's employees in running the train, by a preponderance of evidence, before he can recover; and that he cannot recover even then if he is guilty of negligence which contributed directly to the injury complained of."

12th. The jury are instructed that if they believe from the evidence that plaintiff or his employees, by the exercise of strict care and caution, could have notified defendant's em-

ployees that the threshing machine was on the railroad track in time for them to stop the train before running into the said machine, they were bound to give such notice; and if the jury find from the evidence that plaintiff's employees did not use such care and caution, then the verdict must be for the defendant."

The defendant also asked the court to give the jury several other instructions which were refused by the court; but with the view that we have taken of this case, it will not be necessary to set them out here.

The jury found for the plaintiff and assessed his damages at $194. Upon this verdict the court rendered a final judgment in favor of the plaintiff.

The defendant in due time filed a motion for a new trial and also a motion in arrest of judgment. Each of these motions having been overruled by the court, the defendant saved its several exceptions and appealed to this court.

During the trial of the case the defendant objected to certain evidence offered by the plaintiff, and the evidence being admitted by the court, exceptions were saved; but no point is made on said exception in this court. The only ground of objection urged in this court to the action of the Circuit Court was that the court erred in giving and refusing instructions to the jury.

The defendant first objects to the action of the court in giving the jury the instruction numbered 4 as asked by the plaintiff. This instruction was properly given. The evidence was to the effect that the crossing of the railroad where the wagon broke down with plaintiff's machine on the railroad was out of repair—which was known to plaintiff and his servants. It was proper in such case to submit the question to the jury, whether under all the circumstances in the case plaintiff was guilty of negligence in driving on said crossing; and it was also proper for the court in this case to tell the jury what care and caution plaintiff and his servants were bound to exercise. While the decisions of the courts in the different States on the subject of negligence and contributive

negligence are not always in harmony, and it may be that cases may be found that somewhat differ from the doctrine as laid down by the court in this instruction, yet it is believed that said instruction is in full harmony with the law on said subject, as laid down by a series of decisions in this State, and that there was no error committed in giving said instruction.

The fifth instruction as numbered in the record, tells the jury that if the plaintiff was guilty of negligence, but that his negligence was not the direct cause of the collision, and that the defendant's negligence was the direct cause of the collision, they should find for the plaintiff. This instruction is substantially the same as an instruction which was held to be good by this court in the case of Karle vs. The Kansas City, St. Joseph & Council Bluffs R. R. Co., 55 Mo., 476. The learned judge delivering the opinion of the court in that case remarks: "The instruction given by the court on this subject was, that if the jury found that the deceased was guilty of any negligence that contributed directly to cause his death, they would find for the defendant. This instruction is unquestionably in conformity to the well settled doctrine of the State, however, it may be regarded elsewhere."

It would be scarcely necessary to say that the converse of what is there asserted is true. That is, that where the negligence of the plaintiff did not directly contribute to the injury of the plaintiff, but that the injury was the direct consequence of the negligence of the defendant, he would be liable for the damages sustained.

The instruction given for the plaintiff numbered six attempts to tell the jury what may be taken into consideration in ascertaining what is and what is not a direct cause of an injury.

The instruction is not very clear and is not calculated to give the jury much light on the subject, and was wholly useless and unnecessary; but still there is nothing in said instruction which was calculated to mislead the jury to the prejudice of the defendant.

The 8th and 9th instructions asked for by the plaintiff were substantially the same, and told the jury that although the plaintiff was guilty of negligence which contributed to the injury, yet if they believed that the agents of defendants managing its cars and locomotive, with which the injury was done, could have avoided the injury by the use of ordinary care and caution, they should find for the plaintiff. These instructions seem to be justified by a series of decisions made by this court, and particularly when taken in connection with the instructions given on the part of the defendant, they present the law fairly to the jury. It is true, that cases may be found, and, in fact, have been referred to by the attorneys of the defendant, which seem to be somewhat variant from the law as declared in this case; but in this State the law is well settled, and I think it conforms to the law as given to the jury by the instructions in this case. It would be difficult to say, with any show of reason or justice, that because a man is acting in a negligent way, everybody would be licensed to carelessly and recklessly injure him and then plead his negligence as a defense to their reckless and wanton conduct. (Morrissey vs. The Wiggins Ferry Company, 43 Mo., 380; Brown vs. The Hann. R. R. Co., 50 Mo., 461; Illinois Central R. R. Co. vs. Middlesworth, 46 Ill., 494; 38 Ill., 370; Karle vs. The Kansas City, St. Joseph & C. B. R. R. Co., 55 Mo., 476.)

The instructions given in this case, when taken together, certainly presented the case to the jury in as favorable a light as could have been done under the law as well settled in this State; and where the instructions, if taken as a whole series, applying to every possible phase of the case, fairly present the law to the jury, and are not calculated to mislead, this court will not reverse the judgment on the ground that all is not contained in a single instruction. (Karle vs. Kansas City, St. Joseph & C. B. R. R. Co., above referred to.)

The instructions asked for by the defendant and refused by the court have not been noticed in this opinion for the reason that it is believed that the law of the case was fully and fairly

presented to the jury by the instructions given; in which case it would not be error in the court to refuse any further instructions even if such instructions did contain abstract law. But it is believed that the instructions refused contained principles of law which had been better given in other instructions, or failed to properly present the law.

In this case the law as before stated had been fully given; and, in fact, if there was anything in the action of the court, as it appears in the record, which was not commendable, it was that the jury were instructed too much.

The judgment is affirmed; Judge Hough concurs in the result; the other judges concur.

RICHARD HAMILTON, Respondent, *vs.* JOHN HAMILTON, Appellant.

1. *Practice, civil—Specific performance—Suit for, how tried.*—An action for specific performance of a contract for the conveyance of real estate and for such order and decree as the court may direct is not a case for a jury unless on issues specially submitted. (Wagn. Stat., p. 1040, § 12.)
2. *Specific performance—Damages in lieu of.*—In suit for specific performance, damages may be adjudged in lieu thereof.

Appeal from Livingston Circuit Court.

Collier & Mansur with Normille & Moore, for Appellant.

Wait, with Broaddus & Pollard, for Respondent.

NAPTON, Judge, delivered the opinion of the court.

The petition alleges that in 1859 the defendant, who was a brother of the plaintiff, agreed with plaintiff, who was eleven years old, and his mother, (who was a widow,) that if the plaintiff and his mother would come to defendant's house and live with him, and if the plaintiff would assist in farming operations until he arrived at the age of twenty-one years, the defendant would, on plaintiff's arrival at the age of twenty-one, give to plaintiff one-half of all his estate, real and personal.

The petition further states that the plaintiff and his mother did go to defendant's house and continue to stay there till plaintiff was twenty-one years old, and that plaintiff, during this time, performed all the labor required of him by defendant; that on the 11th day of April, 1869, the defendant was owner of certain lands described, altogether 303 acres, and personal property worth $1,300 dollars, and that the land was worth $30 per acre.

The petition then avers a demand for this division and a refusal on the part of defendant, and the prayer is to decree a specific performance, and for such order or decree as to the court may seem just.

The defendant denied the agreement and pleads the statute of frauds. And he denies the performance of the alleged agreement; and to this there was a replication.

The bill of exceptions, which is the only record in the case, then states, that the plaintiff introduced proof to sustain the allegations of the petition; to all of which defendant objected, on the ground that it was parol evidence for the conveyance of real estate, and to prove a contract which was not to be performed within a year from its date. It was conceded, that no agreement in writing was made, but the evidence was admitted and exceptions taken. Evidence was also introduced to maintain defendant's answer. None of the evidence is preserved in the bill of exceptions. Thereupon, certain instructions were given to the jury, from which we may infer that the case was submitted to a jury. The substance of the instructions was, that if plaintiff and his mother performed their contract, alleged in the petition, they should find for plaintiff one-half of the value of defendant's property.

The jury assessed the plaintiff's damages at $700 and a judgment was entered therein. From this judgment an appeal is taken.

There is no statement that any issues were submitted to a jury, or that any such issues were decided by the court.

Our practice act requires that an issue of fact for the recovery of money or of specific real and personal property

must be submitted to a jury, unless a jury trial is waived. It also requires that every other issue must be tried by the court but the court is authorized to take the opinion of a jury on any specific question of fact involved, by an issue made up for that purpose. The petition in this case asked for a specific performance of a contract and for such order or decree as the court might direct. It was not a case for a jury, unless specially directed; but it seems that the court ordered a jury and adopted the verdict of a jury and gave judgment, not for a specific performance, but for the damages found by the jury for non-performance.

The damages found and the questions on the statute of frauds are not in the case. The evidence on the trial is not before us, nor are the instructions.

That damages in lieu of performance may be adjudged by a court, is decided in the case of Holland vs. Anderson, (38 Mo., 55).

We will therefore affirm the judgment; the other judges concur.

DANIEL MCCLURE, Respondent, *vs.* GEORGE R. LOGAN, Appellant.

1. *Judicial sale—Land purchased at, where judgment had been satisfied—Title acquired.*—A purchaser at a judicial sale takes no title to the land purchased although bought in good faith and without notice, where the judgment had been satisfied prior to the sale under the execution issued thereon. The debt being extinguished the power to sell died with it. And in regard to this contingency the purchaser buys at his peril.

Appeal from Nodaway Circuit Court.

Johnston & Jackson, with L. H. Case, for Appellant.

I. A sale of land to an innocent purchaser, under an execution issued on a valid subsisting judgment, is not void nor voidable by reason of such judgment being satisfied by pay-

ment in the State of Indiana, unless some notice of such satisfaction had been given to the sheriff or purchaser prior, to such sale, by entering the same of record, as required by statute, or recalling the execution from the sheriff. (Reed vs. Austin, 9 Mo., 73; Weston vs. Clark, 37 Mo., 568; Durett vs. Briggs, 47 Mo., 356; Wood vs. Colvin, 2 Hill [N. Y.], 566; Myers vs. Cochran, 29 Ind., 256; Nichols vs. Dissler, 2 Vroom Law R. [N. J.], 461, 462; 6 Barr, top of p. 249; 29 Ind., 256.)

II. The sale was not void nor voidable, for the sheriff in making the sale was by law constituted the agent of the defendant. The *fi. fa.* being in full force, sustained by a valid subsisting judgment at the time it came to that officer's hands and no notice of its revocation being received by him until long subsequent to such sale, the act of such agent concluded his principal, the respondent. (Conway vs. Nolte, 11 Mo., 74; Sto. Ag. [Bennett's Ed], § 470; Rorer Jud. Sales, §§ 54, 55, 56.)

III. A purchaser at sheriff's sale, is bound to look only to the judgment, execution, levy and sheriff's deed; and if they, upon their face, will support the sale, the purchaser is protected in his purchase, if notice be not proved *aliunde* upon him. And if any of the parties to the record or the sheriff are in default and loss occurs, the person in default must sustain it. (Lenox vs. Clark, 52 Mo., 115, 117, 118.)

Dawson & Edwards, for Respondent.

I. A sale of real estate, made under color and authority of an execution, issued upon a judgment which was satisfied at the time of the sale, is absolutely void, and a sheriff's deed, executed in pursuance of such sale, passes no title, even to an innocent purchaser for a valuable consideration. (Weston v. Clark, 37 Mo., 586; Durette vs. Briggs, 47 Mo., 356; Bartlett vs. Abney; Durfee v. Moran, 57 Mo., 374; Wood vs. Colvin, 2 Hill, 566; Craft vs. Merrill, 14 N.Y., 456; Swan vs. Saddlemire, 8 Wend., 676; Lewis vs. Palmer, 6 Wend., 368; Neilson vs. Neilson, 5 Barb., 565; Carpenter vs. Still, 11 N. Y., 61; Jackson

vs. Clark, 18 Johns., 440; Delaplane vs. Hitchcock, 6 Hill, 19; Millard us. Caufield, 5 Wend., 61; Sherman vs. Boyce, 15 Johns., 443; Jackson vs. Anderson, 4 Wend., 474; Laval vs. Rawley, 17 Ind., 36; State vs. Lalyers, 19 Ind., 432; Myers vs. Cochran, 29 Ind., 256; Hammett vs. Wyman, 9 Mass., 137; King vs. Goodwin, 16 Mass., 63; Dew vs. Werrell, 11 Ired., 424; Harwell vs. Wersham, 2 Ham., 524; Rorer Jud. Sales, 252, § 720; Freem. Judgm., 399, § 480.)

II. As the sheriff sold to Porter under a power, if there was in fact no subsisting power by reason of the satisfaction of the judgment upon which the execution was based, no title passed. (Jackson vs. Anderson, 4 Wend., 474.)

SHERWOOD, Judge, delivered the opinion of the court.

In a proceeding to cancel certain deeds, the court below held that a purchaser, at a judicial sale, took no title to land purchased, although he purchased in good faith and without notice; that the judgment was satisfied prior to the sale, under the execution issued thereon.

The point was considered in Reed vs. Heirs of Austin, 9 Mo., 722; but there was a division of opinion in regard to it; the majority of the court holding that the purchaser obtained a title notwithstanding the previous satisfaction of the judgment. The subject was not, however, extensively nor elaborately discussed, nor were the authorities cited in support of that view. (Jackson vs. Caldwell, 1 Cow., 622; Jackson vs. Anderson, 4 Wend., 474), directly in point.

In the subsequent case of Durette vs. Briggs (47 Mo., 356), the matter underwent a more thorough discussion, when a conclusion in conformity to that arrived at by the trial court in the case at bar was reached. So, also, Durfee vs. Moran, (decided at our last August term) although containing other elements on which the decision of that case might have rested, yet on the point in hand arrives at the result just indicated.

And though there is a conflict of authority in regard to the validity of a purchase made under the circumstances heretofore mentioned, it is confidently believed that the current of judi-

cial opinion will be found in accord with that adopted by our own court, in its more recent decisions. (Ror. Jud. Sales, § 722; Jackson vs. Morse, 18 Johns., 441; Wood vs. Colvin, 2 Hill, 566; Carpenter vs. Stillwell, 11 N. Y., 61, Craft vs. Merrill, 14 *Id.*, 456; Hammatt vs. Wyman, 9 Mass., 138; King vs. Goodwin, 16 *Id.*, 64; Swan vs. Saddlemire, 8 Wend., 676), and cases cited.

The principle on which these decisions rest, is that the existence of the debt, whose collection is the sole object of the issuance of the *fi. fa.*, is the basis on which the power to sell alone depends; that when the debt is extinguished, the authority under and virtue of the execution dies with it, and that he who buys under a power buys at his peril, and takes nothing by his purchase if the alleged power does not exist. And no good reason is perceived, why the same principle is not applicable in a case like the present, as would be applied to one where the authority is conferred by the act of the parties rather than that of the law.

If the principal is dead, although the purchaser is unaware of the fact, and acts in the most perfect good faith, yet his purchase from the agent is a nullity and no title ensues therefrom. Such hazards are the inevitable incidents which attend the doings of all acting under delegated powers, whether conferred by some private person, or by the law.

There were none of the ingredients of an equitable estoppel in this case. The plaintiff, who resides in Louisville, Ky., had settled up the judgment and all costs in full, in October, 1869, and the sale did not take place until the following April; and having the judgment satisfied under the agreement devolved entirely on the plaintiff in the judgment, and on its agents. There is no ground then to impute *laches* in this regard to McClure, or to hold him estopped by a state of facts of which he was wholly ignorant.

The judgment is affirmed, all the judges concur.

CHARITON COUNTY, Plaintiff in Error, *vs.* WILLIAM E. MOBERLY, Defendant in Error.

Attachment—Temporary absence from the State no ground for attachment when—Non-residence—Absence from place of abode.—One who is temporarily absent from this State, having his domicile here, although his dwelling is closed in the interim, is not absent in such a way that his property may be attached for non-residence, as contemplated by sub-division 1 of causes for attachment. In such case he is absent "from his usual place of abode," as meant by sub-division 4; and if his absence is such that a summons issued on the same day with the attachment will not be served in sufficient time to give plaintiff all his rights at the return term, he will be held to have so "absented himself" "that the ordinary process of law cannot be served upon him."

The "residence" of the party referred to in subd. 1, is his "domicile," in the same sense as that in which the latter word is used in subd. 6.

2. *Domicile of married man, how determined.*—If a married man has two places of residence at different times of the year, that will be deemed his domicile which he himself selects or describes or deems to be his home, or which appears to be the centre of his affairs, or where he votes or exercises the rights and duties of a citizen.

Error to Chariton Circuit Court.

Shackleford, for Plaintiff in Error, cited in argument, Drake Att., §§ 59, 67; Adams vs. Abernathy, 37 Mo., 195; 1 Wend., 43; Roosevelt vs. Kellogg, 20 Johns., 208; 8 Wend., 140; 4 Wend., 603.

C. A. Winslow, for Defendant in Error, cited in argument, Green vs. Beckwith, 38 Mo., 384; Exchange Bank vs. Cooper, 40 Mo., 169; Kingsland vs. Worsham, 15 Mo., 441; Ellington vs. Moore, 17 Mo., 424; Adams vs. Abernathy, 37 Mo., 196; 1 Am. Lead. Cas., [4 Ed.] 747–8, and notes; Bank, &c. vs. Balcom, 35 Conn., 351; Sto. Confl. L., § 47, [6 Ed.]; Harvard College vs. Gore, 5 Pick., 370.

HOUGH, Judge, delivered the opinion of the court.

It appears from the record in this cause, that on the 5th day of November, 1870, an amended petition was filed by the plaintiff, which, after setting forth the cause of action, concludes with the statement, "that at the time of the commencement of this action, to-wit: on the 24th day of April, A. D., 1869, defendant, W. E. Moberly was a non-resident of and did not reside in the State of Missouri."

Annexed to this petition was an affidavit of the attorney of the county of Chariton, subscribed and sworn to on the 23rd day of November, 1869, which also stated that on the 24th day of April, 1869, defendant William E. Moberly was not a resident of the State.

A writ of attachment issued on the 5th day of November, 1870, which was levied on property of the defendant in Chariton county; an order of publication was made, published and proved, and at the May term, 1871, the defendant filed the statutory plea in abatement, denying that on the 24th day of April, 1869, he was a non-resident of the State.

The issue thus made was tried by the court without the aid of a jury, and the finding of the court being for the defendant, and it being admitted by the parties that the defendant had not been served with process, except by publication, and that at the time of the commencement of the action the defendant was not and had not since been a resident of Chariton county, the suit was dismissed for want of jurisdiction. A motion for a new trial was made, overruled and excepted to, and the case comes here by writ of error.

At the trial the deposition of the defendant was read in his own behalf, in which he stated that he had been a resident of the State of Missouri since 1839, and had been a resident of the city of St. Louis since 1864; that he had been in business in said city continually since 1865, and had a business office there, which he daily attended except during a portion of the summer of 1866; that from 1864 to 1872, he resided at various places in said city. He spent the summer of 1866 with his family at Perry Springs, Illinois. In 1867 he purchased and fitted up a dwelling in Alton, Illinois, as a summer residence, where his family remained during the year 1867, and during the summer of 1868. In March, 1869, he again removed his family from St. Louis to Alton, to spend the spring and summer of that year, but about the 15th of April his dwelling there was burned, and his family shortly afterwards removed to St. Louis. The place owned by him at Alton was only intended as a temporary or summer residence. On

the 24th day of April, 1869, he had no temporary residence outside the State. Defendant also read the deposition of Charles O. Logan and Joseph T. Edwards, which tended to show a continuous residence of defendant in St. Louis, from the year 1864 to the year 1872.

No testimony was offered by the plaintiff. Plaintiff then asked the court to declare the law as follows: 1st. "That if the court finds from the evidence that the defendant, William E. Moberley, in the month of March, 1869, removed with his family from the city of St. Louis, in this State, to the State of Illinois, for the purpose of spending the summer in Alton, in said State of Illinois, and ceased during said time to keep house in the city of St. Louis, then the court declares the law to be, that during said summer residence the defendant was a non-resident of Missouri; and if the defendant with his family was thus residing in the State of Illinois on the 24th of April, 1869, at the date of issuing the attachment, the finding must be for the plaintiff on the plea in abatement, notwithstanding the court may believe that defendant had a place of business in St. Louis, during his summer residence in Illinois." 2nd. "That the facts stated by defendant Moberly in his deposition prove that he was a non-resident of the State of Missouri on the 24th of April, 1869, within the provisions of the attachment law, in relation to attachment against the property of non-residents." Which instructions were by the court refused, and the plaintiff excepted.

The court gave the following declarations of law at the instance of the defendant: "If the court sitting as a jury shall find from the evidence, that the defendant, William E. Moberly was a resident of the State of Missouri, so that an ordinary summons could have been served upon him on the 24th day of April, 1869, the day on which the attachment issued in this case, the verdict and judgment should be for the defendant.

The purpose of the second instruction asked by plaintiff, seems to have been to treat the deposition of defendant as an admission by him, and to require the opinion of the court

upon its legal effect, and in this view was perhaps not liable to the objection that it assumed the facts to be true, and dealt with only a part of the testimony. It certainly cannot be that every temporary absence from the State, of a man and his family, for purposes of business, health or relaxation, will subject his property to seizure by attachment, unless he leave behind him a domestic establishment occupied by some member of his family, with whom the officers of the law could leave process which they might have in their hands for service on him during such absence; and yet, to use the language of Judge Gamble, in the case of Kingsland vs. Worsham, (15 Mo., 657) "it is difficult to define the character and prescribe the duration of the absence which shall justify the use of this process. It may be asserted, however, that where the absence is such that a summons issued upon the day the attachment is sued out, will be served upon the defendant in sufficient time before the return day to give the plaintiff all the rights which he can have, at the return term, the defendant has not so absented himself as that the ordinary process of law cannot be served upon him;" and even in that case the process could not issue on the ground of non-residence, but only under the fourth sub-division of the first section.

Such an absence from the State as that described in plaintiff's first instruction, cannot constitute the non-residence intended by the first sub-division of the first section of the attachment act. "One who is not a resident of this State, or is a non-resident as contradistinguished from an absconding resident, must be taken to mean a person whose domicile, usual place of abode, or permanent residence is not in this State, but in some other State." (Greene vs. Beckwith, 38 Mo., 384.)

The statute provides that the writ of attachment may issue in three classes of cases, where the residence of the defendant is involved. First, where he is not a resident of the State; second, where the defendant has absconded or absented himself from his usual place of abode in this State, so that the ordinary process of law cannot be served upon him; third,

when the defendant is about to remove out of this State, with intent to change his domicile.

The word "residence" has technically a more restricted meaning than "domicile," but in this act the words, "not a resident," and "domicile" must be held to be used with reference to the same subject matter, and to denote opposite conditions with reference to habitancy, but not differing in degree. One who is not a resident of this State is one who has a domicile elsewhere. One who has a domicile in this State cannot be a non-resident while temporarily absent from the State. In such case he is absent from his usual place of abode in this State, and if he leaves behind him no member of his family at such place of abode for the period mentioned by Judge Gamble in the case cited above, then he is so absent that the ordinary process of law cannot be served upon him.

Under this section of the attachment law, and the section of the practice act in relation to the service of process, provision is made whereby the plaintiff in any civil action may have the benefit of legal process, when the defendant is permanently absent, temporarily absent, or is about to permanently absent himself from the State.

According to the testimony of the defendant, he had been domiciled in this State for thirty years, and had been a resident of the city of St. Louis for five years, regularly attending to his business there every secular day during that time, with the exception of one summer. The greater portion of this time his household were with him in St. Louis, and that city was his permanent place of residence, and the absence of himself and family from the State, as testified to by him, did not make him a non-resident, within the meaning of the attachment act.

According to the testimony the defendant was clearly subject to ordinary process in St. Louis county, and not liable to attachment. If a married man has two places of residence at different times of the year, that will be deemed his domicile which he himself selects or describes or deems to be his home,

or which appears to be the centre of his affairs, or where he votes or exercises the rights and duties of a citizen. (Sto. Con. Laws, §§ 47, 6 and 8.)

There was no error in giving and refusing instructions, and there was testimony to support the finding. Whether the issue made as to non-residence at the time alleged was proper or material, it is unnecessary to determine.

The judgment is affirmed; the other judges concur.

HENRY S. MCKERN, Respondent, *vs.* JOHN W. CALVERT, Appellant.

1. *Witness—Cross-examination—Impeachment.*—The general rule is that on cross-examination, to try the credit of a witness, only general questions can be put, and the witness cannot be asked as to any collateral fact merely with a view to contradiction by subsequently called witnesses.
2. *Seduction—Proof of subsequent unchaste conduct.*—In suit for seduction, proof of criminal connection, of the woman seduced, with persons other than defendant, subsequent to the seduction, and, also, proof touching the general character of defendant, is properly excluded.

Appeal from Mercer Circuit Court.

H. G. Orton, for Appellant.

H. J. Alley, with S. H. Perryman, for Respondent.

NAPTON, Judge, delivered the opinion of the court.

This is an action for seduction of the plaintiff's daughter. The verdict of the jury for the plaintiff was reduced by a remittitur to $500. The instructions, given on the trial, are correct; but some points are made in regard to the evidence which perhaps deserve notice.

On the cross-examination of the plaintiff's daughter, she was asked in regard to a statement made by her at Middlebury before the Lodge, which she referred to in her examination-in-chief; whether she had not, in such statement, in the presence of certain persons named, declared that she had had

no intercourse with any other man except the defendant. This question was excluded by the court, and we think properly. There was no inconsistency between the alleged statement at Middlebury, and the testimony of witness on the trial. The object of the question seems to have been to elicit from the witness, in an indirect way, a statement that she had never had intercourse with any person but the defendant, with a view to contradict it by proof that she did have such intercourse. But the question was not put to witness; nor could such a question have been allowed in that form, without restriction as to time. The mere fact of intercourse with other men, was a fact collateral to the main issue in the case. Its proof would not disprove seduction by the plaintiff nor tend to disprove it; nor even tend to a mitigation of the damages, unless such intercourse preceded the seduction. This is the first step on the road to ruin; and that it is followed by rapid advances in the same direction, is only an aggravation of the crime of the seducer.

The general rule is, that on cross-examination to try the credit of a witness, only general questions can be put, and the witness cannot be asked as to any collateral fact merely with a view to a contradiction by subsequently called witnesses. (1 Greenl. Ev., 455.)

A party may contradict the statements of a witness on the stand, by showing that inconsistent statements have been made elsewhere; but in this case it is not proposed to show any statement inconsistent with the one made on the stand, but an additional statement upon a point not directly involved in the issue, with a view to impeach the witness by the introduction of subsequent evidence. In other words, the statement of a witness, on a point, collateral to the issue, made before the trial and not under oath, and not inconsistent with the testimony given at the stand, is sought to be brought into the sworn testimony, that it may be contradicted. This would tend to endless investigations upon points entirely foreign to the issue.

The court properly excluded all evidence tending to show improper or unchaste conduct of the plaintiff's daughter after the alleged seduction.

And the court rightly excluded the evidence offered to show defendant's general character for chastity and virtue. His general character was not in issue.

And the court properly excluded the question whether the bad character of plaintiff's daughter was not entirely independent of any connexion with defendant. Evidence of bad character was offered and admitted; and there was testimony on the other side. As to the origin of such rumors, it would of course depend upon the mere opinion of the witness; and that was a matter upon which the jury could decide, from the facts in evidence.

The second instruction given for the plaintiff, which withdrew from the consideration of the jury the testimony of a witness concerning some familiarities between plaintiff's daughter and one Logan, at a gathering of young people, termed "a party," might have been omitted. There was nothing of importance in the evidence, but it might have been left to the jury to draw their own inferences.

Upon the whole, we think the case was fairly submitted, and the judgment on the verdict should stand. Judgment affirmed, the other judges concur.

DAVID MUMPOWER, Respondent, *vs.* THE HANNIBAL & ST. JOSEPH RAIL ROAD CO., Appellant.

1. *Railroads—Killing of stock—Allegations as to negligence and failure to erect fences, etc.*—In suit against a railroad company, the petition alleged that defendant's cars "wrongfully and illegally, and against the will of plaintiff," ran over his cattle, and that the same were killed, owing to defendant's failure to erect and maintain good and substantial fences on the side of the road, "where the same passes through, along or adjoining enclosed or cultivated fields of plaintiff." Petition held substantially good.

2. *Railroads—Damages—Instruction—Enclosed fields, etc.*—In suit under § 43, Art. II, Railroad law, Wagn. Stat., 310, against a railroad for damages, in killing stock, an instruction, which does not leave to the jury the question as to whether the accident occurred at a point on the road where the same passed through enclosed or cultivated fields, is erroneous.

3. *Railroads—Damages—Killing of bull—Const. Stat.*—In suit against a railroad, for killing stock, it is no defense that the animal was a bull and subject to the provisions of § 5 of the act for restraint of certain animals therein named. (Schwarz v. Hann. & St. Joe. R. R., 58 Mo., 207.)

Appeal from Livingston Circuit Court.

James Carr, for Appellant.

L. T. Collier, for Respondent.

NAPTON, Judge, delivered the opinion of the court.

This was an action to recover the value of a bull alleged to have been killed on a portion of the track of defendant where it passed through an enclosed pasture.

The suit was brought under the 43rd section of the 2nd article concerning corporations. (Wagn. Stat., 310.) There was a verdict and judgment for plaintiff.

The principal point made here is that the petition does not state a cause of action. The petition differs from the one passed on in Aubuchon vs. St. Louis & I. M. R. R. (52 Mo., 522) only in using the words "wrongfully and illegally, and against the will of plaintiff," instead of "negligently and carelessly;" but any of these epithets as applied to the act of the company under this section are unnecessary.

It is charged that the bull was killed by reason of the failure of the defendant to erect and maintain good and substantial fences on the side of the road "where the same passes through, along or adjoining enclosed or cultivated fields of plaintiff."

We think the petition was substantially right.

The court instructed the jury "that if the plaintiff was the owner of the bull mentioned, and that defendant, by its agent, etc., did, on or about the 12th September, 1872, at the county, etc., strike, wound, cripple and render useless, said bull by

means of a train of cars drawn by a locomotive, then and there running on defendant's road, they must find for plaintiff, provided they further find that said bull strayed upon said railroad and was so struck, wounded and crippled by reason of the failure of defendant to erect and maintain fences on the side of said road where the said animal strayed on the same and was injured as aforesaid, etc."

This instruction was the only one given, and it is plainly defective in not leaving to the jury the question as to whether the accident occurred at a point on the road where, by law, the company was required to erect fences; that is, where the road passed through enclosed or cultivated fields.

The point made here, in regard to the act which prohibits bulls from being allowed to run at large, (Wagn. Stat., 134) was decided in a case determined at St. Louis, the title of which is not remembered.*

Judgment is reversed and the case remanded; the other judges concur.

*Schwarz v. Hann. & St. Joe. R. R. Co., 58 Mo., 207.—Reporter.

HORACE CARPENTER, Respondent, *vs.* JOHN W. GRISHAM, Appellant.

1. *County roads—Establishment of by overseer—Failure to comply with preliminary requirements, as to assessment of damages, notice, etc.—Trespass—Injunction, when granted—County, joinder of, as defendant.*—Where a road overseer takes possession of private land for a public highway without any relinquishment of the right of way, assessment of damages, tender of compensation or legal notice or waiver thereof, although he acts under orders of the County Court, he may be proceeded against by injunction. And this remedy will lie without prior resort to suit at law. And where the proceedings of the County Court are nullities, he may be sued either by injunction or for trespass.

And where a road has been established, or ordered to be opened, it is too late to comply with the statutory requirements as to assessment, tender of damages, etc.; and the injunction is properly made perpetual.

In such suit, the County Court should properly be made co-defendant with the road overseer.

2. *Injunction—Nuisance—Exhaustion of legal remedies, etc.*—The rule that one must establish his right to redress in equity by prior action at law, applies specially where the aid of the chancellor is invoked to restrain nuisances. And even in such cases, it is held that this rule prevails only where the right itself is in dispute or doubtful.

Appeal from De Kalb Circuit Court.

Strongs & Bennett Pike, for Appellant.

I. Trespass will not lie against a road overseer who is attempting to open a road under the order of the County Court. (Butler vs. Barr, 18 Mo., 357.) Of course, if trespass would not lie against defendant for the acts complained of by plaintiff, an injunction would not lie to restrain him from doing the acts or threatening to do them.

II. The sole object of this suit is an injunction, which the law does not allow, there being no suit in trespass, nor any prayer in the bill, for an account or compensation. (Welton vs. Martin, 7 Mo., 307.)

III. A party complaining of a tort, must have established his right to a redress by an action at law before he is entitled to a perpetual injunction. (Arnold vs. Klepper, 24 Mo., 277; Echelkamp vs. Schrader, 45 Mo., 505.) The principle of relief by injunction against a tort, is that damage is caused or threatened to property admitted or legally adjudged to be plaintiff's. (Ad. Eq., p. 207.)

IV. The bill was not brought against the proper parties. The County Court is the proper party to the bill, if the order under which the overseer is acting, in opening a road, is not a nullity.

V. If there is any irregularity in the proceedings, or non-compliance with the law on the part of the court, they will only be enjoined till such time, as they should have complied with the law. It would be error in such a case to make the injunction perpetual. (Champion vs. Sessions, 2 Nev., 271; High Inj., p. 226.)

Wm. Henry, for Respondent.

I. The legal steps necessary to authorize the seizure of the land, were not taken. (See Gen. Stat. 1865, p. 290, § 1; p. 296, §§ 48–50; p. 219, §§ 8–11; Newby vs. Platte Co., 25 Mo., 258; Walther vs. Warner, *Id.*, 277; High Inj., 225; Lind vs. Clemens, 44 Mo., 540.)

II. A court of chancery will always enjoin to prevent the taking of land without just compensation. (Hil. Inj., 2 Ed., 566, § 25, and 520, § 23; Sederner vs. The Norriston, etc., Turnp. Co., 23 Ind., 623; Smith's Com. Constr., 473–476, and authorities cited.)

III. It is now a well settled principle of equity jurisprudence, that the remedy by injunction is allowable against a mere trespasser, when the injury sought to be averted goes to the destruction of the inheritance, or is otherwise irreparable in its character. (Echelkamp vs. Schrader, 45 Mo., 505; Weigel vs. Walsh, 45 Mo., 560.)

Hough, Judge, delivered the opinion of the court.

This was a proceeding by injunction to restrain the defendant, who was a road overseer in De Kalb county, from occupying a portion of the plaintiff's land, lying in defendant's district, and laying out a public road thereon, and from tearing down his fences, destroying his fruit and ornamental trees, and filling up his well for that purpose.

The road commissioner had laid out the road along the half section line, which was the eastern boundary of plaintiff's land, and on February 4th, 1868, made report thereof, together with a plat showing the location of the road. Whereupon the County Court, on the same day, ordered the road overseer of the district, through which said road ran, to proceed to open the same as required by law.

In May, 1871, the County Court made another order for keeping open and removing obstructions from said road, and defendant was acting under this order at the time plaintiff made application for injunction. There was no relinquishment of the right of way by the plaintiff, or his grantors, and there was no assessment of damages by the commissioner, as

required by law, and no money had ever been tendered to or deposited for the plaintiff or his grantors, as damages or compensation for the strip of land proposed to be taken.

A temporary injunction was granted and afterwards at the hearing, a final judgment was rendered, making the same perpetual, from which defendant has appealed to this court.

It will not be necessary to notice the testimony as to the amount of land proposed to be taken, and the true position of the half section line, with reference to the plaintiff's fences and improvements, as the judgment of this court will be governed by other considerations.

If the land proposed to be taken was within the limits of the road as located, the rights of the parties will depend upon the force and effect of the proceedings, had for the purpose of opening the road; and if it was not within said limits, then the defendant clearly had no right to appropriate it for the purposes of a public highway.

It is urged by the appellant that the order, appointing an overseer to open a road, is sufficient to protect him, as to acts done in good faith in opening the road, from liability as a trespasser on account of any irregularity in the proceedings previous to the order; and that, therefore, an injunction will not lie to restrain him from the threatened or attempted execution of permanently injurious acts, when such order exists.

I do not think so. The very fact that he could not be sued at law, would be a good reason for affording this remedy to prevent the unlawful commission of injuries of a permanent and irreparable character, for which there would otherwise be no redress.

If the proceedings of the County Court were nullities as to the complainant, I apprehend the overseer might be liable as a trespasser, and also subject to the wholesome restraint of a court of equity. Nor was it necessary for the plaintiff, before bringing his bill, to establish his right to redress by an action at law, as is contended by appellant's counsel. That doctrine is more particularly applicable, where the interference of

equity is invoked in restraint of nuisances; and even in respect to such cases, it is said that the modern doctrine of courts of equity is much more liberal than the ancient, and that the rule requiring the right to be first established at law, prevails only where the right itself is in dispute, or is doubtful. (High on Inj., § 516.)

In this case, the title and possession of the plaintiff, though denied in the answer, were not disputed on the trial, and are admitted here.

The character of the impending injury afforded ample ground for the interposition of a court of equity, if the plaintiff's right had not been legally divested for the public benefit. It involved the permanent appropriation to the public use of a portion of the plaintiff's inheritance; a complete and entire divestiture of all his rights in, and control over, the same. No injury to land could be more irreparable, for it was the extinguishment of the estate itself.

There can be no question, but that the taking of private property for the construction of highways, without any tender of compensation, or assessment of damages, when required by law and not waived by the party, affords good ground for equitable relief. (High on Inj., § 400.)

In this case there was no relinquishment of the right of way, no assessment of damages, no tender of any compensation, no legal notice to defendant or any of his grantors, no waiver, and therefore no authority whatever to justify the attempt to transfer the use and possession of the land in question, from the plaintiff to the public. (Gen. Stat. 1865, ch. 52, § 11.)

Appellant further insists that, at all events, it was error to make the injunction perpetual, and that it should have been continued only until such time as the officers of the law should comply with its requirements as to the assessment and tender of damages.

Cases may arise where such a decree would be proper; but it would have been improper in this case. The road having been established, or ordered to be opened by the County

Court, without taking the necessary steps provided by the statute, to give validity to its action as to plaintiff, it is now too late to assess damages in that proceeding. The right to use his property for the benefit of the public, can only be acquired by the institution of new proceedings in conformity to the statute.

Regularly, the County Court should have been a party; but no objection was made in the court below, on that account, and the injunction decreed, with the views here expressed, will probably accomplish all that would result from such decree, if the county were a party.

We are all of the opinion that the decree shall stand. Judgment affirmed.

JEREMIAH X. MITCHELL, Respondent, *vs.* THOMAS MCMULLEN, Appellant.

1. *Administrator's sale—Purchase through third party by person who was administrator—Title acquired, etc.*—The title to land sold at an administrator's sale and deeded by the purchaser for a nominal consideration to the person who administered, is voidable, if timely steps are taken to set it aside, but is not absolutely void.
2. *Land and land titles—Purchaser of land not relieved against payment of purchase money for mere defect of title.*—A purchaser of land who has taken a conveyance with covenants of title, and is in undisturbed possession, will not be relieved against the payment of the purchase money, on the mere ground of defect of title, there being no fraud or false representations as to the title, and no eviction. (Connor vs. Eddy, 25 Mo., 75.)

Appeal from Chariton Court of Common Pleas.

Geo. W. Easley, with Casper W. Bell, for Appellant.

I. The evidence and finding of the court both showing two-ninths of the title to be outstanding, and the plaintiff insolvent, the contract should have been rescinded. When the legal title cannot be conveyed and the vendee must resort to a court of equity to establish his title, notwithstanding the

conveyance of all the rights of the vendor the court will not compel him to pay the purchase money. (Hill. on Vend., [2 Ed.] p. 244; Bank, &c. vs. Hagner, 1 Pet., 455.) The vendee cannot be compelled to take a doubtful title; and a title is doubtful when other persons may fairly question it. (Hill. Vend., [2 Ed.] p. 210, § 3.)

Kinley & Kinley, for Respondent.

I. Before the court will grant the relief sought by appellant, it must conclusively appear that Mitchell willfully made false statements concerning the title to said property with intent to cheat and defraud McMullen; that McMullen relying solely upon these representations, purchased said property, and was injured by reason of said representations being untrue. (Cooley vs. Rankin, 11 Mo., 643, 645, 646; Langdon vs. Green, 49 Mo., 363, 368, *et seq.*; Exchange Bank vs. Russell, 50 Mo., 531, 535; Holland vs. Anderson, 38 Mo., 55; Bryan vs. Hitchcock, 43 Mo., 527; Corry vs. Keyser, 30 Ind., 214; Drake vs. Latham, 50 Ill., 270; Manny vs. Eaton, 3 Humph., 347; Slaughter vs. Green, 13 Wall. [U. S.] 379; Meyer vs. Armidon, 45 N. Y., 169; 40 N. Y., 562; Taylor vs. Scoville, 54 Barb., 34.)

II. Equity will not enjoin the collection of notes for price of land sold, after execution of deed, on account of failure of title, without eviction of purchaser, actual or constructive, by purchase of outstanding title, unless fraudulent practices in the sale of said property and fraudulent representations concerning the title to the property sold, are clearly proved to have been resorted to by the vendor and payee of said notes. (Abbott vs. Allen, 2 Johns. Ch., 522; Edington vs. Mix., 49 Mo., 134; Wheeler vs. Standley, 50 Mo., 509; Norman vs. Wells, 17 Wend., 160; Mitchell vs. Warner, 5 Conn., 497, 522; Hanson vs. Buckner, 4 Dana, [Ky.] 254; Upshaw vs. Debow, 7 Bush, 442; Potter vs. Taylor, 7 How., 133; Hacker vs. Blake, 17 Ind., 97; Small vs. Reeve, 14 Ind., 164; Norman vs. Lee., 2 Black, [U. S.] 499; Sedg. Dam., 4 Ed., 150, 204; James vs. Hayes, 34 Ind., 272, 300; Kirtz vs. Carpenter,

5 Johns., 120; Beddoe vs. Wadsworth, 21 Wend., 120; St. John vs. Palmer, 5 Hill, 599; Meadows vs. Hopkins, 3 Porter, 181; Davis vs. Rowland, 2 J. J. Marsh, 27; Barton vs. Rector's Adm'r, 7 Mo., 524.)

III. None but the heirs, creditors, or distributees can object to an administrator purchasing property of the estate being sold at administrator's sale, and then only by attacking the sale before confirmation by Probate Court, or by petition to redeem in a court of equity.

NAPTON, Judge, delivered the opinion of the court.

The action in this case was upon a note for $750, which was in part consideration of a sale and conveyance of certain lots in the city of Brunswick, in the county of Chariton.

The defense was, first, that the vendor fraudulently misrepresented the exact exterior lines of the lots, by stating that they were marked by the fences around them, which was untrue; and that the defendant was damaged by such false representations to the amount of $1000; and, second, that the plaintiff represented to the defendant that he had a good title, when the title was in the heirs of his wife, then dead; and therefore the defendant asked a rescission of the contract.

In regard to the first ground of defense, the court submitted issues to a jury, which were found for the plaintiff, and the court adopted the verdict; and as no stress is laid here upon this branch of the case, the details of the issues, evidence, instructions and decree of the court in reference thereto may be omitted. The court in its decree found, upon this point, "that the plaintiff did misrepresent and conceal the true location of the northern boundary of the lots, at the time negotiations were pending for their sale; but that when defendant finally executed the contract of sale, by paying a part of the purchase money, executing his notes for the balance, and accepting a deed from plaintiff to the lots, he had actual notice of all the facts in the premises; that the fencing represents the true southern boundary of said lots as originally surveyed and marked; that the adjoining proprietors have so acted as

to be estopped from disputing said boundary, and that during the pendency of this suit they have executed and delivered to plaintiff a deed to the disputed ground."

In regard to the second and main ground of defense, the court found upon the hearing as follows: "That the plaintiff was guilty of no fraud in the representations he made about his title; that he represented the same to be good, but at the same time disclosed to defendant the nature and source thereof, and that defendant finally executed the contract of sale and accepted a warranty deed from plaintiff to himself unconditionally, and with actual notice of the true situation of plaintiff's title. The court further finds that plaintiff's title was defective in part in this—that said title was derived from Maria E. Mitchell, deceased; and the deed of plaintiff as administrator of said Maria E. Mitchell, to Henry L. Gaines, and the deed of said Gaines back to plaintiff, offered in evidence by plaintiff, are void, and vested no title in plaintiff; that by reason thereof the title to the lots in Keyle's addition vested in the heirs of said Maria E. Mitchell, viz: (naming them); that by deeds from seven of the heirs the plaintiff had acquired seven-ninths of the title, and two-ninths were outstanding in Laura Bowman, a person of unsound mind, and Sallie Bowman, whose existence and whereabouts were unknown."

The court therefore decrees that the contract remain undisturbed; that the plaintiff recover the amount of the note with interest, but that as the plaintiff was insolvent, a stay of execution be allowed, and the collection of the second note be enjoined, until the plaintiff executes a bond with security to be approved by the court, to secure and save harmless the defendant against any assertion of the two-ninths of the title outstanding; and the plaintiff and defendant were adjudged to pay each one-half of the costs.

It may be observed that the plaintiff's title was derived from a sale made by him, as administrator of his wife, by virtue of regular proceedings in the Probate Court, at which sale one Gaines became the purchaser; and that Gaines after-

wards conveyed, for a nominal consideration to plaintiff. It has never been held in this State, that such a purchase *per interpositam personam* is void, as the court decided it was in this case. It is undoubtedly voidable if timely steps are taken to set it aside.

But we will consider the case as one of a failure of two-ninths of the title, a defect which may or may not produce any inconvenience or expense to the purchaser. There is no evidence that the plaintiff made any false representations as to the title; he supposed himself to have a good title, and he was so advised by his attorney. The defendant received a deed with warranty; took possession of the lots; paid $500 of the purchase money in cash and $2000 in lands, and executed his notes for the remaining $1500 in two notes, one of which is now sued on. This consummation of the contract occurred several months after its execution, and after the defendant was fully apprised of the nature of his vendor's title, and of the source from which he derived it.

The case of Bank of Columbia vs. Hagner, (1 Pet., 455) is relied on in support of the defendant's position in this case. The statement in that case is somewhat obscure; but I infer from what is said, that it was an action for specific performance of a contract. The reporter says, that the plaintiff instituted an action on a special agreement to purchase two lots of ground in the city of Washington; and the judge who delivered the opinion reiterates this statement. The court held that where the vendee had to resort to a court of equity to establish his title, they would not compel him to pay the purchase money, and thus take a law suit instead of the land. We do not consider this and cases of like character as having any bearing on the present.

The doctrine of this court has been that where a party buys a tract of land, receives a deed with warranty, and goes into possession, he cannot defend against a note given for the purchase money upon the mere ground of speculative defects of title, unless there have been fraudulent and false misrepresentations made to him in regard to this title. A mistake of

a vendor as to the validity of his title may easily occur, and his warranty deed is designed to protect the purchaser against such mistakes. It is a dangerous and delicate operation for a court to pass upon a title which nobody is asserting and no one is disputing. The vendee is in possession and no one is controverting his title, except the vendee himself, and this for the purpose of avoiding payment of the purchase money.

As Judge Scott observes in Connor vs. Eddy, (25 Mo., 75) "A purchaser of land, who has taken a conveyance with covenants for title, and is in undisturbed possession, will not be relieved against the payment of the purchase money, on the mere ground of defect of title, there being no fraud in the sale nor eviction." And in the case of Wheeler vs. Standley, (50 Mo., 511) Judge Adams says: "Where there is no fraud and a party receives a conveyance with covenants of warranty for title, he cannot retain possession and set up a failure of title when sued for the purchase money." And this has been the received doctrine here from an early period. In the case of Cooley vs. Rankin, (11 Mo., 643) it was observed: "The vendor is alleged to be guilty of fraud in this, to-wit: in representing he had title when he had none. If this be fraud, then every breach of warranty must be attended with fraud. The sufficiency of a title to land will frequently depend upon questions of law about which the most learned men may differ; and it would be strange if men who had not made the law their profession were exempt from errors in their opinions and representations on such a subject. There is no principle of equity which holds men responsible for such representations, if made in good faith." And in Barton's Adm'r vs. Rector, (7 Mo., 528) the court say: "A manifest distinction is to be traced through all the cases between executory contracts and those which have been executed. In the latter class, where a deed has been made and possession given, there must be an eviction at law under paramount title, before the court of chancery will interfere; and the vendor selling in good faith is not responsible for his title beyond his covenants."

The court in this case, adopting the rule in Abbott vs. Allen, (2 Johns. Ch., 519) and finding the plaintiff insolvent, required security against speculative failure on two-ninths of the title, before execution on the judgment for the note sued on should be enforced. No complaint is made on account of this by the plaintiff, and, therefore, the judgment will be affirmed. The other judges concur.

THOMAS J. PRICE, Appellant, *vs.* JAMES T. HUNT, Respondent.

1. *Partnership—Parol evidence as to, when inadmissible.*—Although the general fact of the existence or non-existence of a partnership, or the names of the members and the like, may in some instances be shown by parol, notwithstanding existence of written articles of co-partnership, yet when the question involves a construction of the instrument, viz: whether it be a contract of partnership or one of agency merely, in such cases, the writing must be produced or shown to be unobtainable before parol evidence is admissible.
2. *Partnership—Appropriation of firm assets to payment of individual debts.*—It is well settled, that one member of a firm cannot, without the consent of his co-partners, appropriate the firm effects to the payment of his individual debts.

Appeal from Carroll Circuit Court.

L. H. Waters, for Appellant.

Ray & Ray, for Respondent.

VORIES, Judge, delivered the opinion of the court.

This action was founded on a negotiable promissory note executed by the defendant and made payable to one W. H. Mitchell, and was for the payment of $160, twelve months after date and dated the 4th day of February, 1870, and assigned to plaintiff before maturity.

The defendant, as a defense to the action, charged that at the time of the execution of the note, said W. H. Mitchell, one T. C. Kendrick and plaintiff were partners, engaged in the selling of a patent right seed sower; that said note, although executed and delivered to said Mitchell, was in fact

the property of said partnership; that the sole and only consideration of the note was the sale by said partnership to the defendant of the exclusive right to sell said patent right in Livingston and Caldwell counties; that after the execution and delivery of said note, defendant fully paid off and discharged the same to the said Kendrick; and that the proceeds of said payment went into said partnership funds, and the said partnership still existed; that said Kendrick, when said note was paid, promised to obtain the note and deliver it to defendant; that the fact that said note was partnership property was known to plaintiff; that plaintiff was notified of the payment of said note and requested to deliver the same to defendant, which he failed to do. Wherefore, defendant denies that said note is still due and unpaid, or that the plaintiff ought to recover the same. But defendant prays that said note may be delivered up to the defendant by order of the court, and that defendant may have such other judgment, etc.

The plaintiff filed a replication to said answer, in which he specifically denied all of the affirmative or material allegations in the answer, and averred that the note was sold and assigned to him before maturity, for a valuable consideration and without any notice of any defense to the note on the part of the defendant as against the payee therein or otherwise.

A trial was had before the court without the intervention of a jury.

On the part of the plaintiff, the note and endorsement were read in evidence. The defendant was then examined on his own part, and testified to the following effect, that he gave the note sued on to W. H. Mitchell, for Price's patent right seed sower, for Livingston and Caldwell counties; that Price was the patentee and maker of the machines; that he afterwards paid T. C. Kendrick the note, which payment was made as follows: Kendrick claimed to be a partner of Mitchell and Price in the note, and witness had sold five counties for T. C. Kendrick and was to have five other counties for his pay. In September, following the date of the note, Kendrick and

defendant agreed that defendant should have the note now sued on, for his pay, instead of the five counties. The note was not in Kendrick's possession at the time. The defendant had sold the five counties before said agreement with Kendrick and they were sold for Kendrick. Mitchell is reported to be dead.

T. C. Kendrick was next introduced as a witness for defendant, who testified that he and plaintiff and W. H. Mitchell, in December, 1869 or 1870, went into partnership. The partnership was formed in the State of Illinois, at the plaintiff's machine shop in Macomb, where plaintiff resides. The partnership agreement was reduced to writing, and the writing, witness thought, was among Mitchell's papers. Here the plaintiff objected to any testimony in relation to the terms of said partnership or the contents of said writing. The objection was overruled by the court and the plaintiff at the time excepted. Whereupon, said witness was allowed, against plaintiff's objection, to testify that by the terms of said partnership, Mitchell and witness were to travel and sell territory and furnish machines, to be made and furnished by plaintiff; and that after deducting the cost of sales, traveling expenses and four dollars for each machine, the witness and Mitchell were to have two-thirds of the net profits for their pay. Witness never saw the note sued on until the suit was brought on it. It was also stated by said witness, that the partnership spoken of by him was dissolved in the spring after the note was given, and that it was in the next September that the arrangement was made to settle the note as detailed in defendant's evidence; that Mitchell and witness traveled over the country as agents of plaintiff until the spring of 1870, in selling said patent right; that they sold under power of attorney from plaintiff; that Kendrick had paid Mitchell for his part of the note, by crediting his account with the amount.

There was some other evidence tending to show that Kendrick had an interest in the note, but the foregoing is, substantially, the evidence offered by defendant.

The plaintiff then introduced evidence tending to prove that he was never in partnership with Kendrick and Mitchell, or either of them, and that he purchased the note sued on from Mitchell for value, without any notice of any defense thereto, etc.

At the close of the evidence, the plaintiff asked the court to declare the law to be as follows:

1. "The facts of the case, as stated by Kendrick, did not constitute him, plaintiff, and Mitchell partners."

2. "The payment to Kendrick by defendant was not such a payment as discharged the note."

3. "Kendrick and Mitchell were the agents of plaintiff only, and after their agency terminated and the note was turned over to plaintiff, said Kendrick was not authorized to receive payment of the same."

These declarations of law were refused by the court, and the plaintiff again excepted.

The court then found for the defendant and rendered judgment in his favor.

The plaintiff, in due time, filed his motion for a new trial, on the ground that the judgment was against the evidence; that the court admitted improper and illegal evidence and refused proper declarations of law asked for by the plaintiff.

This motion was overruled and the plaintiff excepted and appealed to this court.

The first objection raised by the plaintiff to the action of the Circuit Court is, that said court permitted the defendant to prove, by oral evidence, the terms and contents of a contract which was shown to be in writing, without accounting for the absence of the written contract, or showing, in any manner, that the writing could not have been obtained or a sworn copy thereof obtained to be used as evidence in the case. The rule that the best obtainable evidence must always be produced, is familiar to every lawyer. But it is insisted by the defendant in this case, that a partnership may be proved by any legal evidence; that it may be proved by the clerks engaged in the partnership business, or by anybody who knows

the fact, notwithstanding there may be written articles of partnership. This may be generally, and it is in some cases undoubtedly true. If a third party, who has dealt with a partnership firm, seeks to make other members liable for the contract of one of the members made within the scope of the partnership, such third person may prove, by any one who knows the fact, that the partner sought to be charged, has held himself out to the world to be a partner. So any clerk who does business for the firm and who knows the fact, may testify as to who are the individuals constituting the firm, etc. But when the question in issue, as in this case, is whether a contract made between parties is sufficient to constitute said parties partners in a certain business, or whether the contract, by its terms, only constitutes two of the parties agents to transact a specific business for the third party, and who are to be paid in a specific way for their services, and this contract is shown to be in writing, and it is not shown that it cannot be produced by proper diligence, then I can see no reason to except such a case from the general rule, requiring the best and original evidence to be produced, or its absence accounted for. That this case comes within the reason of the rule there can be no doubt; and these rules have been adopted and are enforced to promote certainty and to avoid perjury and mistakes growing out of the frailty of human memory, after the lapse of years. We are, therefore, of the opinion that the court improperly permitted evidence of the contents and terms of the written contract, without anything to show that the writing could not be produced. (2 Greenl. Ev., § 481; Farrel vs. Brennan, 32 Mo., 328; Carr vs. Carr, 36 Mo., 408.)

It is next objected by the plaintiff, that the court improperly overruled the declarations of law asked for by the plaintiff.

The first and third declarations of law, asked for by the plaintiff, are both predicated on the evidence in the case in reference to the partnership; or, in other words, the correctness of said declarations of law depends upon whether the contract existing between the partners, was a partnership or only

a contract of agency, and as we have held that the parol evidence was not, under the circumstances, admissible, we will express no opinion on the effect of such evidence.

The second declaration of law assumes that when all is taken as true which the evidence tends to prove in reference to the payment of the note, and the manner of its payment, still no legal payment is shown, and, therefore, it is contended that said declaration of law ought to have been given and judgment rendered for plaintiff.

The manner of payment, testified to by defendant himself, is as follows: "I afterwards paid T. C. Kendrick the note in suit as follows. He claimed to be a partner of W. H. Mitchell and T. J. Price in the note. I had sold five counties for T. C. Kendrick and was to have five other counties for my pay. In September, following the date of the note, Kendrick and I agreed that I should have the note sued on for my pay instead of the five counties. The note was not then in Kendrick's possession. * * * * * * * * * The counties had been sold before said agreement with Kendrick, and were sold for Kendrick."

This is the evidence in reference to the payment of the note; and when taken in connection with other undisputed facts in the case, shows that if it amounted to a payment it was made long after it is admitted that the partnership, if any, had ceased to exist. And the evidence above copied, clearly shows that Kendrick was attempting to apply this note in payment of his individual obligation or debt, and there is no evidence to show that either Mitchell or plaintiff consented to such an arrangement. It is settled that one member of a firm cannot appropriate the partnership effects, without the consent of his co-partners, to the payment of his individual debts, either with or without the knowledge of the creditors that the property belonged to the firm. (Ackley vs. Staehlin, 56 Mo., 558.)

In the present case defendant knew that the note belonged to the partnership, if we assume that such existed; so that from the evidence, the attempt at payment of the note was

an illegal attempt to misappropriate the funds of the partnership, and no consent is shown of the other partners, so that no payment, as the evidence now stands, was in fact made.

It was not necessary to pass on this last point in the case; but as the case was to be sent back for another hearing, we thought it would be more satisfactory to indicate our opinion in reference to that point in the case.

The judgment will be reversed and the case remanded; the other judges concur.

HENRY C. PAGE, Appellant, *vs.* THE TOWNSHIP BOARD OF EDUCATION, OF Tp. 57, R. 33, Respondent.

1. *School board—Verbal contract of, binding.*—The contract made on behalf of a school board for the services of an attorney is binding, although not in writing and not pursuant to an order entered on the minutes of the board.

Appeal from DeKalb Circuit Court.

S. G. Loring, for Appellant, cited Turner vs. Chillicothe, &c. R. R. Co., 51 Mo., 501; Western Bank vs. Gilstrap, 45 Mo., 420; Mumford vs. Hawkins, 5 Denio, 355; Pulman vs. Mayor, &c., 54 Barb., [N. Y.,] 171; Salma vs. Mullen, 46 Ala., 411; Merrick vs. Burlington R. R. Co., 11 Ia., 411; Langdon vs. Castleton, 30 Vt., 76.

NAPTON, Judge, delivered the opinion of the court.

This was a suit to recover an attorney's fee of fifty dollars. There was no dispute that the services were rendered, and that the fee was a reasonable one; but the court gave judgment for the defendant on the grounds that there was no written contract made with said school board, and no order entered on the minutes of the board at a regular or stated meeting of said board. The proof was that the attorney was employed verbally.

The judgment will be reversed and the case remanded, with directions that a judgment for the $50 be entered for the plaintiff; the other judges concur.

JOSIAH BAKER, Respondent, *vs.* GEORGE Y. NALL, *et al.*, Appellants.

1. *Conveyance to husband in trust for wife and children—Title of husband after wife's death —May sue child in ejectment.*—Where land is conveyed to the husband in trust for the wife and her children, they will have the equitable title and the right to the rents and profits, and on the death of the wife the fee will vest in the children, but the statute of uses will not pass the legal title to the latter in that event. On the contrary, the father will retain the title in law and the right to supervise the interests of the estate during his life and that of the children. The courts distinguish between a trust given to a stranger to protect the wife from her husband, and a case where the husband is selected to guard her interests and that of the children.

And the trustee may maintain ejectment even against the *cestui que trust.* Thus where such suit is brought against a tenant who had married his daughter, defendant cannot deny plaintiff's title on the plea that, in making the contract of rent, he was ignorant of the daughter's interest.

Appeal from Clay Circuit Court.

J. E. Merryman, Samuel Hardwick, with Henry Smith, for Appellants, cited in argument, Clark vs. McGuire, 16 Mo., 302; Boal vs. Morgner, 46 Mo., 48; Hill Trustees, 406, 421; Wagn. Stat., 1350, § 1; Roberts vs. Mosely, 51 Mo., 282; Guest vs. Farley, 19 Mo., 147; Tay. Land. Ten., § 705; 2 Greenl. Ev., § 305; Stagg vs. Eureka T. & C. Co., 56 Mo., 217—320; Terrill vs. Boulware, 24 Mo., 254—257; Big. Est., 380, *et seq.* and 396; Johnson vs. Houston, 47 Mo., 227–231.)

J. W. Jenkins, with James E. Lincoln, for Respondent, cited in argument, Walker vs. Harper, 33 Mo., 592; Parker vs. Raymond, 14 Mo., 535; 1 Wash. Real Prop., 377; 2 *Id.*, 206, 209; Jenkins vs. DeWatts, 7 Johns., 157; Jackson vs. Scissom, 3 Johns., 498; Layohare vs. Dobbin, 3 Johns., 223; Jackson vs. Waller, 7 Cow., 637; Thompson vs. Lyon, 33 Mo., 219; Guest vs. Farley, 19 Mo., 147; Roberts vs. Moseley, 51 Mo., 287.

NAPTON, Judge, delivered the opinion of the court.

This is an action of ejectment, to recover 160 acres of land in Clay county.

The petition and answer are in the usual form, except that the answer, after denying all the allegations of the petition, sets up as a defense, that one Lloyd R. Leach executed a deed conveying the land to plaintiff as trustee for his wife and her children, and that plaintiff's wife is dead, and that the defendants, who married two daughters of plaintiff, are in fact the rightful owners of 2-3 of this land.

The facts in the case seem to be undisputed. It appears that in 1843, Thomas Turner, of Madison county, Kentucky, made a will, devising two small tracts of land to two trustees, named Leavitt and Turner, in trust for the use and benefit of his daughter Sarah Ann Baker, wife of the plaintiff in this case. In 1844, Turner made a deed, having the same object in view, in which he conveyed to these same trustees the same land named in his will, in trust for the use of Sarah and her children, providing in this deed that she be permitted, in conjunction with her husband, to occupy and use this land.

After the death of Turner, an act of the legislature of Kentucky was passed, authorizing the Circuit Court of Madison county to take cognizance of a proceeding in chancery, looking to a sale of this land in Kentucky, and a re-investment of the proceeds in Missouri land; and a decree was accordingly procured, substituting Baker, the husband, in lieu of the original trustees, and authorizing him to sell the Kentucky lands at a price below which he was not allowed to sell, and to invest the money in Missouri, subject to the same trusts.

This was done regularly, and everything done by Baker was sanctioned by the court, and the 160 acres now in dispute were bought, and the deed was made to Baker as "trustee for his wife and her children."

It seems that after the death of Baker's wife, he rented the land in controversy, for five years to the defendant Nall, who had married his daughter, and that the defendant Russell, intermarried with the other daughter in 1865, and lived with Nall. It further appears, from the statement of Nall, that he was not aware, when he rented said land, of the interest of

his wife; and he relies on this ignorance as an answer to the position, that a tenant cannot dispute the title of his lessor.

There were three children of plaintiff and Sarah Ann, his wife, two of whom are defendants with their husbands; and the plaintiff has bought the interest of the other child, who was a son.

The court declared the law to be as asked by plaintiff, which was:

1. "That the defendant, Nall, having gone into possession of the premises in controversy, as the tenant of plaintiff, is estopped from denying the plaintiff's title."

2. "That under the pleadings and evidence, the plaintiffs are entitled to recover."

3. "That the court cannot in this action undertake to settle the respective rights of the plaintiff, as trustee, and the beneficiaries of the trust estate."

4. "That the plaintiff is entitled to recover the possession of the wife's share of the real estate in controversy, as tenant by the courtesy."

The defendants asked for the following instructions:

"That Lloyd Leach and wife conveyed the property to Josiah Baker in trust and for the use and benefit of Sarah Ann, his wife, and her children, and said Sarah Ann is dead, leaving Thomas her son, and Elizabeth Nall, wife of defendant, and Rebecca Russell, wife of Christopher Russell; that Russell intermarried with Rebecca in 1865; that Nall intermarried with Elizabeth in 1866, and that about two months thereafter, the defendant Nall, without any knowledge of said title and of the interest of his said wife, and by mistake of her rights, made a contract by which he rented the premises from plaintiff; and the plaintiff has since purchased the interest of his son Thomas. Therefore, the court declares that plaintiff is entitled to one undivided third of the premises, and defendants to the remaining two-thirds, and judgment is entered accordingly."

This instruction the court declined to give, and the judgment of the court was as follows:

"Now at this day come the parties aforesaid, and the court being fully advised, etc., finds that the plaintiff is entitled to the possession of the premises claimed," etc.

This case presents several points, involving questions of importance and difficulty, both as to the rules of pleading and the merits.

The conveyance to Baker, does not fall within the rule established in Mosely vs. Roberts (51 Mo., 285). There is no doubt, this was an executed trust, since nothing was to be done on his part to complete his obligations as trustee. Still it was a trust, not a use executed by the statute. The use was not merely for the wife, but the children. Where a trust is rendered useless, as in the case of a stranger being made trustee, to protect the wife's interest from her husband, and and the wife dies or the husband dies, the trust is discharged and the legal title passes to the *cestuis qui trust.* (Mosely vs. Roberts, 51 Mo., 285.)

But in this case, the trust is to the father and husband, for the use of the wife and children. This trust is not discharged by the death of the wife, the trustee still living.

The children, after the death of the wife, had an undoubted equitable right to the rents and profits of the estate; and the plaintiff had no right to rent the farm to his son-in-law for $500, unless the rent was returned to his two daughters. But the son seems then to have been a minor, and as trustee, the plaintiff might lease the land; but for any misappropriation of the rent, could have been held liable in a suitable proceeding.

If the construction of this deed is to be to hold the wife and children as tenants in common of the equity, then the plaintiff had a clear title to one-fourth, as tenant by the courtesy.

But I incline to think that the meaning of the deed was to give an estate for life in the wife, and an estate in fee in her children; but while the trustee lived, especially during the minority of his children, he was the owner of the legal title, and the statute of uses did not pass his legal title to the *cestuis qui trust;* and being the owner of the legal estate,

he could maintain an ejectment even against his *cestuis qui trust.*

The land was purchased with the money of the wife, that is, with the proceeds of lands in Kentucky, conveyed to trustees for her by her father. The trustees in Kentucky were strangers; but the court in Kentucky allowed the plaintiff, who was the husband, to invest the money arising from the sale of the lands in Kentucky, in lands here on the same trust. This was done, and the Kentucky court approved of the sale in Kentucky and the purchase here. There is no impeachment of the transaction. Everything done by this plaintiff was strictly in accordance with the order of the court in Kentucky. The title from Leach was to plaintiff "as trustee for his wife and children."

The question is, does his interest, as trustee, cease with the death of his wife? Or did the estate at once pass, under the statute of uses, to his wife and children?

Mr. Lewin says "Trusts executed are where the limitations of the equitable interest are complete and final. In the trust executory the limitations of the equitable interest are not intended to be complete and final, but merely to serve as minutes and instructions for perfecting the settlement at some future day." And Chancellor Kent says: "a trust is executory where it is to be perfected at a future period, by a conveyance or settlement, as in a conveyance to B., in trust, to convey to C. It is executed, either when the legal estate passes, as in a conveyance to B., in trust, for the use of C., or where only the equitable title passes, as in case of a conveyance to B. to the use of C., in trust for D. The trust in the last case is executed in D., though he has not the legal estate." (2 Washb. Real Prop., 180.)

But Lord Steward explains these definitions: "All trusts are in a sense executory, because a trust cannot be executed except by conveyance, and therefore there is always something to be done. But that is not the sense in which a court of equity considers an executory trust, as distinguished from a trust executing itself."

There is no doubt that the present is an executed trust; and a trustee is not held to take a longer estate than the nature of the trust requires, although the trust is given to him and his heirs. But though this trust was an executed one, within the meaning of the equity law, still it is a trust, and continues till the purposes for which it was created cease. It was not given to a stranger to protect the wife against her husband; but it was conveyed to the husband for his wife and children. The wife and children were the proposed beneficiaries, and the husband was the trustee, selected to guard their interests.

This would give the wife and children the rents and profits of the land, or a complete equitable title; but it would not deprive the trustee of his right to supervise the interests he was, as trustee, required to protect, and for which he was invested with the legal title. In other words, the title did not pass from the trustee during his life and whilst his children were still living. And this conclusion is in manifest accordance with the intent of Turner, the father of plaintiff's wife, in his conveyance of the land in Kentucky, in which the wife in conjunction with the husband was to occupy the land therein conveyed.

"In a court of law, a *cestui qui trust* is a tenant at will of his trustee, and the trustee may recover against him in an action of ejectment for the possession of the premises, and he will not be admitted to deny his trustee's title." (2 Washb. R. P., 210 side page.)

Under our practice this rule may be modified; and if the defendants had in equity a right to the immediate possession, such defense might be set up in an ejectment; but it is not easy to see how the equities of the parties in this case can be adjusted in an action of ejectment. The defendants had an undoubted right to be relieved from payment of rent, so far as their equitable interest in the land is concerned; and the plaintiff would be compelled in a court of equity to discharge his trust.

But the defendants in this suit, regarded either as *cestuis qui* trust or as tenants, could not dispute the title of the plaintiff. Our statute provides that "the attornment of a tenant to a stranger shall be void, and shall not, in anywise, affect the title of the landlord, unless it is made, first, with the consent of the landlord, or secondly, pursuant to or in consequence of a judgment at law or a decree in equity, or sale under execution or deed of trust, or, third, to a mortgagee, after the mortgage has been forfeited."

There is no provision made for ignorance of the tenant's title, and in this case the title existed long before the lease was taken.

Judgment affirmed. Judges Wagner and Sherwood concur; Judges Vories and Hough concur in the result.

DAVID PEARCE, Respondent, *vs.* JOHN C. CALHOUN, Appellant.

1. *Suit against heirs for debt of deceased—Judgment against each must be pro rata.*—Where heirs are proceeded against, on account of assets which they have received from their ancestor, they are to be charged only with their *pro rata* share and one cannot be made liable for the whole.
2. *Administrator—Creditors must sue before proceeding against real estate of heirs.*—No creditor can be permitted to proceed against the real estate in the possession of the heirs, unless he has exhausted his remedy against the administrator, where it is shown that there were assets in his hands.
3. *Probate court—Special statute as to—Circuit Court has no jurisdiction, when.*—Where, under a special statute, all proceedings against administrators in the county must be brought in the probate court thereof, originally and exclusively, the Circuit Court has no original jurisdiction of such actions.
4. *Administration—Claims, when barred—Constr. Stat.*—Where the administrator has given notice of the grant of his letters claims not presented within three years are outlawed. (Wagn. Stat., 102, § 5.)
5. *Administration—Statute as to, supersedes common law.*—The statute concerning administration, was intended to supersede the machinery of common law relating to the same subject. And, certainly, where creditors of an estate attempt to proceed otherwise than in the manner provided by the statute, some very strong and satisfactory excuse should be shown for failure to present the claim in the mode therein prescribed. (Titterington vs. Hooker, 58 Mo., 593.)

Appeal from Linn Circuit Court.

A. W. Mullins, for Appellant, cited 4 Kent. Com., 419, 422 and authorities there cited; Metcalf vs. Smith's Heirs, 40 Mo., 576; Wagn. Stat., 102, §§ 2, 4, 6.

Wagner, Judge, delivered the opinion of the court.

In November, 1870, the plaintiff commenced his action in the Circuit Court against several defendants who were the heirs of William Calhoun, deceased, to recover judgment on two promissory notes alleged to have been executed by the said William in his life-time.

The petition alleged that the said William Calhoun died in the year 1864, and left surviving him the defendants in this suit as his children and only heirs at law, and that he owned certain real estate which descended to them; that letters of administration were duly granted on his estate; and that the estate was fully administered and the assets distributed among the heirs.

The answer, for a defense, set up that on the 2nd day of January, 1865, letters of administration were duly granted upon the said estate by the Probate Court, and that at the time plaintiff commenced his action the estate was not fully administered, and that the administration thereof was still pending; that three years and more had elapsed after the letters of administration were granted, and notice thereof duly published, as required by law, before the action was commenced; and that under the act of the legislature, entitled "an act to establish courts of probate in the counties of Ralls," etc., approved March 19, 1866, the Probate Court had, when the action was brought, exclusive original jurisdiction of the matter. The answer also alleged that there were ample assets in the hands of the administrator to pay off the amount of plaintiff's claim.

There was no replication filed to this answer, and its truth was therefore admitted; but, aside from this, the proof fully sustained its averments.

At the hearing, the plaintiff dismissed as to all the parties except the defendant, who took this appeal, and the court rendered judgment against him only, for the full amount of the claim.

This judgment was evidently wrong in charging the defendant with the full amount, for the rule is, that where heirs are proceeded against on account of assets which they have received from their ancestor, they are to be charged only with their *pro rata* share, and one cannot be made liable for the whole. (Metcalf vs. Smith's heirs, 40 Mo., 576.)

The record shows that there were assets in abundance in the administrator's hands to have paid off and satisfied the plaintiff's demand, for there was nearly five times the amount of the claim for distribution upon final settlement, which was made after the institution of this suit.

No creditor can be permitted to proceed against the real estate in the possession of the heirs, till he has first exhausted his remedy against the personalty, where it is shown that there were assets in the hands of the administrator. In all personal claims the proceeding must, in the first instance, be against the administrator, either in the Probate or Circuit Court, as directed by statute.

At the time this suit was instituted, the Circuit Court had no jurisdiction of the cause, for there was a special statute in force, applicable to Linn county, which gave the Probate Court original and exclusive jurisdiction to hear and determine all suits and other proceedings instituted against executors and administrators, upon any demand against the estate of their testator or intestate, subject to an appeal to the Circuit Court.

This statute, in express terms, requires that all matters touching the administration of an estate and all proceedings which are properly instituted against executors and administrators, shall be brought in the Probate Court originally and exclusively. It negatives entirely any original jurisdiction in the Circuit Court; and such has been the uniform construction placed upon similar enactments. (Cones vs. Ward's adm'r, 47 Mo., 289.)

Our statute provides that all claims which are not presented against an estate for allowance within a prescribed period shall be forever barred (Wagn. Stat., 102); and where the administrator has, by publication, given due notice of the grant of letters, it has been often decided that this bar is effectual and conclusive. The answer alleges a compliance with the law in the matter of making publication, and therefore at the time this suit was brought the statutory period for presenting claims for allowance had expired. The plaintiff, without any apparent reason, had neglected within the prescribed time to pursue his remedy against the estate and have his demand allowed and classified when there were ample assets to pay it off; and then, to evade the statute, he proceeds against the heirs individually, whilst the administration was still pending. This he certainly could not do.

In the recent case of Titterington vs. Hooker (58 Mo., 593), the opinion was expressed that the simple yet effective provisions of our administration law, whereby the whole estate of a deceased, both real and personal, is subjected to the payment of his debts, were designed to supersede the cumbrous machinery of the common law, and afford an ample and complete remedy in themselves. Our Probate Courts were established with extensive powers and jurisdictions, for the purpose of doing everything necessary to the full and final administration of an estate. Both real and personal property are under their control for the payment of debts. They possess about the same powers formerly exercised in England by the ecclesiastical and chancery courts. They are authorized to collect the assets of the deceased, to allow claims, to direct their payment, and to subject the realty to sale where there is a deficiency of personal property to satisfy creditors, and to make distribution to the parties entitled thereto, and, in general, to do everything essential to the final settlement of the affairs of the deceased, and the claims of creditors against the estate.

With a tribunal clothed with such ample powers, all parties have a sufficient protection and opportunity for the assertion

of their rights; at least, if they attempt to proceed otherwise some very strong and satisfactory excuse should be shown for the failure to present the claim in the mode prescribed by law. (Titterington vs. Hooker, *supra;* Phoris vs. Leachman, 20 Ala., 662; Williams vs. Gibbs, 17 How., 239; Public Works vs. Columbia College, 17 Wall., 521.)

The judgment must be reversed; all the judges concur.

FRANCIS P. LITTLETON, *et al.*, Respondents, *vs.* W. H. ADDINGTON, Appellant.

1. *Wills—Conveyance by wife after ceasing to be executrix—Personal and official trusts—Life estate—Alienation, etc.*—By the terms of a will the testator appointed an executor and his wife as executrix, and gave them power to sell at private or public sale all his property as they might deem best for the interests of his estate, and to use the proceeds with a like discretion. The will also gave the wife a life estate during her widowhood. *Held*, that the will conferred an official and not a personal trust, and that after ceasing to be executrix, she had no power to alienate the property.

In such case, even though the trust were a personal one, not affected by her term of office, if the conveyance contained no reference to the power of alienation conferred by the will, nor to anything from which the power might be inferred, the deed would transfer nothing but her life estate.

Appeal from DeKalb Circuit Court.

J. D. Strong & Bennett Pike, for Appellant.

I. The devise of an estate with power of disposal will pass a fee. (Norcum vs. D'Œnch, 17 Mo., 98; Ruby vs. Barnett, 12 Mo., 3.)

The fact that authority to sell the real estate was given to Mrs. Branscom in connection with the other executor, did not impair her right to sell the same after the settlement of the estate and the discharge of the executors, the property being given to her as a personal trust, and for her own use and benefit. (Tainter vs. Clark, 13 Met., 220–27; Hazel vs. Hagan, 47 Mo., 277; Jackson vs. VanZant, 12 Johns., 169; State vs. Boon, 44 Mo., 226; Allison vs. Kurtz, 2 Watts., 158.)

II. In such a case as this, the power may be executed by deed, without reciting it or referring to it, provided the act shows that the donee had in view the subject of the power. (4 Kent. Com., 382-83; Jones vs. Wood, 16 Penn. St., 25; Blagge vs. Miles, 1 Sto., 426; Collier Will case, 40 Mo., 287; Hazel vs. Hagan, 47 Mo., 280-81.)

Wm. Henry, for Respondents.

I. The will did not vest in the widow such personal trust or power as to enable or empower her alone to convey a title in fee simple under the power given in the will. The will provides that "It is my will that my executors shall sell," etc. (Perry Trusts, 253, 4, §§ 273-4, p. 749, § 808; McRae vs. Farrow, 4 Hen. & Munf., 444; Dunlap's Pal. Agen., 177, note 1; Sinclair vs. Jackson, 8 Cow., 584; Green vs. Miller, 6 Johns., 39.)

II. Even if the will did vest in the widow such power as to enable her to convey a title in fee simple under the power given in the will, yet the deed from her to appellant is not to be construed as an execution of such power so as to vest in appellant the fee to the land in dispute, for the reason that said deed was not intended as an execution of the power, as shown from the face of the deed itself. (4 Kent's Com. [9th Ed.], 344; Jones vs. Wood, 16 Penn. St. [4 Harris], 25; Owen vs. Switzer, 51 Mo., 322, and cases there cited; Pease vs. Pilot Knob Iron Co., 49 Mo., 124.)

The true and uniform test is, whether there is any legal interest in the party, for if there be any legal interest on which the deed can attach, it will not execute the power. (See above authorities; 2 Washb. Real Prop., 324-5; White vs. Hicks, 33 N. Y., 383.)

Wagner, Judge, delivered the opinion of the court.

Plaintiffs, who were a portion of the heirs of Joseph E. Branscom, deceased, brought this action to recover certain real estate described in the petition.

It seems that Branscom, by his last will and testament, made his widow and one Brown executors of his estate; and that they qualified and executed the trust, and at the proper time made final settlement.

The land in controversy was not sold by the executors during the pendency of the proceedings in the Probate Court; but after the estate was finally settled and the executors were discharged, the widow alone sold the property to the defendant, and executed to him a general warranty deed therefor, and then, in a short time afterwards, she intermarried with him.

The question is, whether under the will the widow possessed the power of conveying the land; and if so, what estate she could rightfully convey.

The material portions of the will are as follows: "2nd. I give and bequeath to my wife, Diana Branscom, the proceeds of the sale of all my property, both real and personal, requesting that she appropriate a sufficient sum out of said property or proceeds to educate my children, Rachael, Joseph E., Emma J., and Charles Arthur, to have the use of said proceeds during her natural life, or while she remains my widow; 3rd. It is my wish that my executors shall sell at private or public sale, all my property, both real and personal, as soon after my decease as they shall deem most expedient or for the best interest of my estate, and the proceeds thereof to be used or applied in such manner as my executors shall think best, or in such way as to preserve the whole amount of my property from waste; 4th. It is my will that at the marriage or death of my wife Diana, my property should be equally divided among my children living at that time, or to their heirs, providing, however, that my said wife have the sole and exclusive control and use of my said property or money during her life or while she remains my widow; provided further, that the provisions in regard to my children's inheritance in this section, apply to all my children now living, or their heirs; 5th. I hereby appoint my wife, Diana, and Ira Brown my executrix and executor to carry into effect the provisions of this, my last will and testament."

By the second clause above recited, it will be perceived that the testator gives and bequeaths to his wife the proceeds of the sale of all his property, and she is either to have the use of his property or the proceeds arising from a sale thereof, during her natural life or while she remains his widow. There is a request that she shall appropriate a sufficient amount to educate certain children therein named, otherwise, the use of the property or proceeds is to be absolutely hers, during her widowhood.

The third clause is the most important in the decision of this case, and in that he gives his executors power to sell at private or public sale all his property as they might deem best for the interest of his estate, and the proceeds were to be applied and used in such manner as the executors should think best, or in such a way as to preserve the whole amount of the property from waste. The intention is unmistakable. The testator confided in the wisdom and discretion of the executors, and gave them power to sell the property either privately or publicly, and use the proceeds in such a manner as would be most conducive to the interest of the estate.

Where a power is given to several persons having a trust capacity or an office in its nature like that of the executors of a will, susceptible of survivorship, if any of them die or become disqualified to act, the power will survive, unless it is given to them *nominatim*, as to the individuals by name. But in this case there was no survivorship; neither the executor or executrix died or became incapable of acting. They accepted the trust and performed the functions of their office, and brought the settlement of the estate to a final conclusion, without exercising the discretionary power vested in them of selling the land. After they were discharged from further acting in their fiduciary character one had as much power to sell as the other. If the widow possessed it, so did Brown, though he was nowhere named to do or perform any act touching the matter, except in the capacity of executor. That was the designation applied to both; and there is no evidence that any personal trust was reposed in either, outside of their official character.

In the case of Hazel vs. Hagan (47 Mo., 277), the testator willed to his wife all his property during her life; and he also willed that the land might be sold at any time for the comfort and benefit of his wife and the children left with her, as the executors might deem most expedient. The wife was named as executrix, and it was held that the power of sale was a personal trust, not necessarily to be executed by the widow in virtue of her office as executrix, but at any time that she might deem it advisable to carry out the design of the testator. There the property was to be sold at any time for the comfort and benefit of the wife and children, and the power might be executed at any time when it was deemed necessary for the purposes expressed. But here, the selling is to be done by the executors, and the proceeds used and applied by them in such manner as they, the executors, should deem best.

This entirely rebuts any presumption of a personal trust to be executed after they or either of them had ceased to act officially.

The 4th clause reiterates the provision that the wife shall have the sole use and control of all the property and money during her life, or as long as she remains his widow; and then declares that the same shall be divided equally among his children and grand-children at her death or marriage.

The will then gave her an estate for life in all the property or its proceeds, determinable at an earlier day in the event of her marriage. Thus, when she executed the deed to the defendant, she was possessed of a life estate, upon condition; and when she subsequently married, that estate determined and ceased to exist.

There is another point that is fatal to the claim of the defendant. The conveyance by which he obtains title, contains no reference to the will, or the power of alienation conferred in it, or anything from which the power might be inferred; and therefore, according to the rule laid down in Pease vs. Pilot Knob Iron Co., (49 Mo., 124); and Owen vs. Switzer (51 Mo., 322), it transferred only the life estate possessed by the widow.

The court, therefore, in giving judgment for the plaintiff, decided rightly upon the construction of the will and the validity of the defendant's title; but its judgment must be reversed because it awards the plaintiffs too much. It gives them the possession of all the property and all the damages and rents, when the record shows that they are only entitled to a moiety.

Judgment reversed and remanded; the other judges concur.

MOSES L. JAMES AND JAMES W. RAY, *Ex parte.*

1. *Practice, civil—Parties—Substitution of—Responsibility of parties and their sureties—Judgment for costs against original party—Motion to quash execution, etc.*—The plain intent of the practice act (Wagn. Stat., 1872, p. 1050, § 9) is that, where a new party is substituted in lieu of the original party to a suit, the former becomes responsible for all costs, and the original party is discharged, and, in such case, it follows that his sureties are released with him. If the new party is irresponsible, the court should order him to give security. Judgment rendered for costs against the original party and his sureties, after such change, is a mere nullity, and may be set aside on motion, if made in time —without resorting to proceedings in equity.
2. *Execution for costs—Application to quash may be made, when.*—Application to quash an execution, issued on a judgment for costs, may be made to a judge in vacation.
3. *Execution for costs—Motion to quash—Judgment on, final, etc.*—A judgment rendered on a motion to quash an execution for costs is a final judgment from which an appeal will lie.

Appeal from Caldwell Circuit Court.

H. J. Chapman, for Appellant.

Crosby Johnson, for Respondent.

I. A motion to quash an execution will only lie for irregularity in the execution, or in the proceedings under it, and not for irregularity in the judgment. (Gaston vs. White, 46 Mo., 486; see also, Ellis vs. Jones, 51 Mo., 180; Hardin vs. Lee, 51 Mo., 241; Allen vs. Sales, 56 Mo., 28; Cabell vs. Grubbs, 48 Mo., 353.)

II. There was no final order or judgment in this proceeding from which an appeal could be taken. The proceedings on the execution were not put an end to by this order. (Hill vs. Young, 3 Mo., 337; George vs. Craig, 6 Mo., 648; Gale vs. Michie, 47 Mo., 326; Coleman vs. McAnulty, 16 Mo., 173; Union Bank vs. McWharters, 52 Mo., 34; Lenox vs. Clarke, 52 Mo., 115.)

NAPTON, Judge, delivered the opinion of the court.

This was a motion to quash an execution and to restrain the sheriff from selling property levied on under it, because the execution was based on a judgment which was of no validity.

The record is very imperfect; but there is enough to show the following state of facts:

In 1867, Charles Buster and Andrew J. McCollom instituted a suit against Merryweather Thompson, and various other defendants, the object of which does not appear, nor is it material. At the February term, 1870, the clerk of the court moved the court that security for costs should be given by the plaintiffs, and this motion was sustained. On the 24th day of August, 1870, the following bond was filed:

"In the Circuit Court of Caldwell county, Mo.

"Charles Buster and Andrew J. McCollom, plaintiffs, vs. M. J. Thompson and others, defendants.

"We the undersigned agree, bind and obligate ourselves to pay all costs which have accrued, or which may accrue, in the above entitled case. David Buster, M. L. James, James W. Ray, Randolph McDonald."

On the 28th of August, 1871, McCollom, one of the plaintiffs, filed a motion, that David Buster be substituted for him as plaintiff in said cause, alleging that he had sold out all his interest to said Buster in the controverted matter on the 27th day of February, 1872. The order on the record states that the parties appeared (in the case of Charles Buster & A. J. McCollom vs. Thompson and others) and the motion of A. J. McCollom to have David Buster substituted as plaintiff "in

lien of Charles Buster and Andrew J. McCollom is submitted to."

An execution is then preserved in the bill of exceptions, dated 21st of March, 1873, which recites that on the 26th of February, 1873, a judgment was recovered against David Buster and his sureties for costs, to-wit: Moses L. James, James W. Ray and Randolph McDonald, for $123 95 for costs in said suit expended. The sheriff was therefore commanded that of the goods and chattels, lands and tenements of said Buster, James Ray and McDonald, the costs should be made, etc.

The return of the sheriff on the execution shows a levy on certain real estate of James & Ray.

The judgment on which this execution issued was as follows:

David Buster, plaintiff, vs. Thompson and others, defendants. Now, on this day, come into court the plaintiffs, by *their* attorneys, and take non-suit. It is therefore ordered by the court that the defendants go hence, etc., and recover of the plaintiffs and *their securities*, for costs, to-wit: Moses L. James, James W. Ray, etc., the costs herein expended, and that execution issue therefor.

It is stated in the briefs of counsel that, before this judgment was rendered, David Buster was dead, and his attorney entered a non-suit; but there is nothing in the record to show how the suit terminated; nor is it material to the decision of the points made in the motion.

It is clear that the judgment in this case was irregular, one which it is apparent from the record, the court had no power to make. On general principles, the sureties for plaintiff in the case of Chas. Buster and A. J. McCollom vs. Thompson and others cannot be regarded as sureties for David Buster in the case of David Buster vs. the same defendants. One might be willing to become surety for Chas. Buster and McCollom, who would not be willing to become so for David Buster; and generally, the liability of sureties is strictly confined within the fair bounds of the assumed obligation, and not

allowed to be extended beyond that. But on the same general principles, which we assume that no authorities are needed to sustain, the sureties might have been held bound for all the costs that had accrued in this case of Chas. Buster and McCollom vs. Thompson and others, had not our statute regulated this matter otherwise. The 9th section of the 10th article of the practice act, is as follows:

"Where an interest is transferred in any action now pending, or hereafter to be brought, other than that occasioned by death, marriage, or other disability of a party, the action shall be continued in the name of the original party, if the party to whom the transfer is made will indemnify the party in whose name the suit is to be continued against all costs and damages that may be occasioned thereby; or the court may allow the person to whom the transfer is made to be substituted in the action, and in all such cases the party to whom the transfer is made shall be required by the court, upon application of the party who made the transfer, either to give such indemnity, or to cause himself to be substituted in the action; and upon his omission to do so, the court shall order the suit to be dismissed."

This provision clearly implies that, upon a substitution of a new party, in place of the original party to a suit, the substituted party becomes responsible for all costs, and the original party is discharged. Of course, if the original party is discharged from liability, his sureties must be, and if the new or substituted party is irresponsible, the court should order him to give security.

The judgment therefore, on the non-suit, against David Buster and "*their securities*" when the record shows no securities given or asked for in behalf of David Buster, the substituted plaintiff—and the persons named were in fact sureties for Chas. Buster and McCollom, as appears on the record—was manifestly void.

It is objected, however, that on this motion to quash, the court cannot look beyond the execution, and certainly not beyond the judgment; that a proceeding in equity, to set aside

the judgment, was necessary. But we think the sooner irregular proceedings are corrected in the court, and in the case where they occur, the more commendable will be the administration of justice.

The plaintiffs in the motion had never been served with any process whatever, and the judgment against them could only have been rendered on the hypothesis that they were sureties for David Buster, who, it seems, took a non-suit. The record shows that they were not his sureties, and the bond filed and recorded shows that they were sureties for other parties. The judgment against them was therefore a mere nullity, and an execution upon such judgment ought to be arrested, when the application is made in time—as this was. Motions now take the place of writs of *audita querela* and of writs of error, *coram nobis*.

The 67th, 68th and 69th sections of our statute concerning executions, show that applications for such purposes may be made to a judge in vacation.

The apparent injustice of allowing the officers of the court to be deprived of their fees in the case, arises from their neglect in moving the court to require sureties in the substituted or new action, or in the failure of the court, without suggestion, to require this. But, assuming that the law was known to all parties, it is impossible to censure the court.

A point is made here, that the judgment of the court was not final and therefore no appeal is allowed.

The judgment, in our opinion, was final so far as the action of that court was concerned in reference to the motion. The motion was not in regard to a proceeding in the progress of the case, but in regard to an execution on a judgment, and the decision on that motion was the end of it, as much so as if the motion had been in the form of a petition. It was a proceeding independent of the proceedings in the case.

Judgment reversed and the cause remanded. Judges Wagner, Vories, and Hough concur; Judge Sherwood dissents.

PHŒBE CONNOR, Defendant in Error, *vs.* CHICAGO, ROCK ISLAND & PACIFIC R. R. Co., Plaintiff in Error.

PER NAPTON, J.—VORIES, WAGNER AND SHERWOOD, JJ., NOT CONCURRING.

1. *Railroads—Damage act—Negligence of co-employees—Liability of company for, in case of death.*—Under a proper construction of § 2 of the damage act, (Wagn. Stat., 519-20) the representatives of an employee who is killed by a railroad accident, cannot recover against the company, where the accident was caused by the negligence of a co-employee, unless such co-employee was not possessed of ordinary skill and capacity, and his employment or retention after notice of his incompetency, is attributable to the want of ordinary care on the part of the Road.

2. *Railroads—Damage act—Intention of, in case of death of person injured.*—The design of § 2 of the damage act was simply to extend the liability for damages, theretofore attached in favor of the party injured, to his representatives where death ensues, and not to create any new liability in that event. The words "person" and "passenger," in the first and second clauses of that section, were used indiscriminately and at random. (Schultz v. Pac. R. R., 36 Mo., 13, criticised.)

3. *Constr. Stat.—Meaning of act must be carried out.*—Courts should carry out the intent of an act, although to effect this a literal interpretation must be rejected.

PER CURIAM.

4. *Railroads—Damages, where deceased was at time of death a conductor.*—A railroad company will be liable for killing an employee, notwithstanding the fact that deceased was conducting and managing the train at the time of his death, where the company was guilty of negligence in employing an unskillful engineer, or in allowing such engineer to turn over the engine to a fireman who was not qualified to manage it, and the damage resulted from the conduct of the engineer or fireman.

5. *Railroads—Killing of employee—Negligence of co-employees—Liability of road—Care of, in hiring co-employees, etc.*—The majority of the court adhered to the doctrine of Schultz vs. Pac. R. R., (36 Mo., 13) that under § 2 of the damage act, the representatives of an employee killed by a railroad train can recover against the road, where the death was caused by the negligence of fellow servants, without regard to the question whether the company exercised proper care and prudence in selecting and retaining such fellow servants. The word "person," in clause I of that section, includes employees.

PER HOUGH, J.—VORIES, WAGNER AND SHERWOOD, JJ., NOT CONCURRING.

6. *Damage act—Common law liability of company to employees not changed by—Meaning of word "person" in damage act—Design of §§ 2, 3, of act*—The second section of the damage act, was not intended to change the common law rule, that the master is not liable for the death of a servant caused by the negligence of a fellow servant, when the master himself has been guilty of no negligence, or want of care, in the selection, or retention in his service, of the servant caus-

ing such death. The same common law defenses may be made by the master, in a suit brought against him under said section, by the representative of any servant dying from injuries received as therein specified, which might have been made by such master, in a suit brought by the injured servant himself, if death had not ensued. The words "any person" in the first clause of second section include employees, but not such employees, as are fellow servants of those causing the death. (§ 38 of the railroad corporation law, Wagn. Stat. 310 and Rohback v. P. R. R., 43 Mo., 187; referred to.)

The third section of the damage act applies to employees of carriers as well as to other persons.

M. A. Low, for Appellant.

I. Taking section 2 of the damage act as a whole, it is plain that it was designed, not to give a right of action, where none existed before, but to fix and limit the damages recoverable by the representative of a *passenger* from a common carrier, for injuries resulting in death, received either through the carrier or his servants. And the liability of such carrier is rather restricted than enlarged; for the section provides that it shall be a sufficient defense to show that the defect or insufficiency was not a negligent defect or insufficiency.

II. Conceding that the word "person" in § 2, was not confined to "passengers," still the legislature evidently did not intend to apply the law to the mutual relations of master and servant. If so, then the strange proposition follows that while the care of the master in selecting the negligent co-employee will shield him from liability, for the worst form of injuries not resulting in death, in the latter event he will be bound, notwithstanding the exercise of the last degree of caution in making the selection.

If an employee die from the effect of injuries received through the negligence or wrongful act of his employer, his representatives under § 3 can only recover what is just and right, not exceeding $5,000. So, under the decision in the Schultz case, the negligence of the co-employee is more culpable than the willful wrong of the employer.

III. It is settled beyond question, that under the general law an employer is not liable to servants for negligence of

fellow servant, where the master uses proper care in employing and retaining such fellow servant. (See 43 Me., 209; 11 Ia., 421.)

IV. It may be asked why the word "person" was used in the first clause, and "passenger" in the second. The obvious answer is, that if by "person" any other than passengers and employees were included, it would be necessary to exclude them in the second clause, which could concern only passengers and employees. And the very fact that employees were not included in the second clause, raises a very strong presumption that it was not intended to include them in the first clause, for there was a greater reason for extending the provisions of the second clause to them, than for including them in the first.

V. In the construction of a statute, the proper course is to search out and follow the true intent of the legislature, and to adopt that sense which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature, (United States vs. Winn, 3 Sum., 209.) And while an employee may be included within the words of the second section of the damage act, the conviction is irresistible that he is not within the purview of the act. It will not be presumed that the legislature, in a section enacted for the sole purpose of regulating damages, turned aside from its main purpose to create a new liability, and especially a liability that the sages of the law, for time out of mind, have held to be against public policy. (Sullivan vs. Railroad Co., 11 Ia., *supra.*)

C. M. Wright, with H. G. Orton, for Defendant in Error.

I. The intent of the legislature in § 2 of the damage act, was to give an employee the same remedy in case of death as was given to passengers and other persons. (Schultz vs. Pac. R. R. Co., 36 Mo., 13, and cases there cited.)

There is no obscurity in the words of the statute, and the courts should not create obscurity by construction. (31 Har., 72; Smith's Com., 822.) The decision in the Schultz case

has been the settled law of this State for ten years. (Rohback vs. Pac. R. R., 43 Mo., 194; Moss vs. Pac. R. R., 49 Mo., 167.)

PER NAPTON, Judge.

This action was brought by the widow of Michael Connor to recover the statutory penalty of $5,000 damages for the death of her husband, caused by the negligence and unskillfulness of the officers, servants, agents and employees of the defendant.

The defense was that the plaintiff's husband was a brakesman at the time of the accident, and that the collision which overturned the cars, was not the result of any negligence.

The testimony of the plaintiff on the trial tended to show the following state of facts: The gravel train of the defendant, which was in charge of the plaintiff's husband, as head brakesman, was backing up a switch, to allow a regular train to pass, and while running round a curve, ran over a cow, precipitating several of the flat cars down an embankment. Connor was on the car farthest from the locomotive, or the front car, as the train was running, and was killed. There was proof to show that the train was going at the rate of twenty-five or thirty miles an hour, though the engineer, or temporary engineer, stated that there was no steam on, and it was running on a descending grade at about five or six miles an hour.

There was also proof that the engine was at the time in charge of a fireman, the engineer being in the caboose adjoining, and that he was incompetent and had been subsequently discharged for incompetency.

On motion of plaintiff's counsel, the court instructed the jury as follows: 1st. If the jury believe from the evidence that the injuries from which Michael Connor died, were received without fault or negligence on his part; and that the injuries from which he died resulted from, or were occasioned by, the negligence of employees of the defendant while running, conducting or managing the locomotive or train of cars

on which said Connor was at the time of receiving said injury, then they will find for plaintiff; 2nd. Negligence, as used in the foregoing instructions, consists in the doing of some act with reference to the running, managing or conducting of said locomotive or train of cars by the officers, agents, servants or employees of defendant, which a reasonable, prudent man would not do, or in the omission by them to do some act with respect thereto, which a reasonable, prudent man would not omit to do.

On behalf of defendants, the court instructed the jury as follows: 1st. It is admitted by the pleadings, that at the time of his death, Michael Connor was an employee of defendant and acting in the capacity of brakeman; 2nd. Unless the jury find from the evidence that Michael Connor died from an injury or injuries resulting from, or occasioned by the negligence or unskillfulness of some officer, agent, servant or employee of defendants whilst running, conducting or managing a locomotive, car or train of cars of defendants, then they ought to find for defendants. 3rd. Even if the jury find that at the moment of the injury, the engine driving the train on which Michael Connor was killed, was being managed and conducted by an employee of defendants, who was not a skillful engineer, still the jury ought not to find for plaintiffs on that account unless they further find from the evidence that Michael Connor died from an injury or injuries resulting from or occasioned by the unskillfulness of such employee. 7th. In this cause the presumption of law is, that the employees of defendant performed their duties skillfully and carefully, and the plaintiff cannot recover unless it is proved affirmatively that the death of Connor resulted from, or was occasioned by, negligence or unskillfulness on the part of some officer, agent, servant or employee, who at the time was running, conducting or managing the locomotive, or train of cars on which the injury occurred."

The following instructions asked by the defendants, were refused by the court: "4th. From the simple fact of an accident and injury resulting in the death of Michael Connor,

no presumption of negligence or unskillfulness can arise. On the contrary, the presumption would be, that the accident resulted from misadventure or inevitable fate, or other cause for which the defendants would not be liable. Hence, in this case the plaintiff cannot recover in the absence of affirmative and positive proof that Michael Connor died from an injury or injuries resulting from or occasioned by the negligence or unskillfulness of the officer, agent, servant or employee of defendant, who was at the time of the injury running, conducting or managing the locomotive or train of cars of defendant. 5th. If the jury believe from the evidence, that Michael Connor, as head brakeman, had the charge and control, and was running, conducting and managing the train of cars at the time of the accident and injury which resulted in his death, they will find for defendant. 6th. Plaintiff cannot recover on account of any negligence or unskillfulness of the other brakeman who was braking on the train at the time of the injury which resulted in the death of Connor.

There was a verdict and judgment for plaintiff.

From the pleadings, evidence and instructions in this case, it is clear that the case was tried on a construction of the second section of the act concerning damages, given by this court in the case of Schultz vs. Pac. R. R., 36 Mo., 13.

The section referred to, is as follows: "§ 2. Whenever any person shall die from an injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive or train of cars, or of any master, pilot, engineer, agent or employee, whilst running, conducting or managing any steamboat or any of the machinery thereof, or of any driver of any stage coach or other public conveyance, whilst in charge of the same as a driver, and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or in any steamboat or the machinery thereof, or in any stage coach or other public conveyance, the corporation, individual

or individuals in whose employ any such officer, agent, servant, employee, master, pilot, engineer or driver shall be at the time such injury is committed, or who owns any such railroad, locomotive, car, stage coach or other public conveyance at the time any injury is received resulting from or occasioned by any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying, the sum of five thousand dollars, which may be sued for or recovered; first, by the husband or wife of deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or, third, if such deceased be a minor and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor. In suits instituted under this section, it shall be competent for the defendant for his defense, to show that the defect or insufficiency named in this section was not of a negligent defect or insufficiency."

The next succeeding sections are as follows: "§ 3. Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is not such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured."

"§ 4. All damages accruing under the last preceding section shall be sued for and recovered by the same parties and in the same manner, as provided in the second section of this chapter, and in every such action the jury may give such damages as they may deem fair and just, not exceeding five thousand dollars, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue, and also having regard to the mitigating and aggravating circumstances attending such wrongful act, neglect or default."

As the construction given to this second section of the damage act in Schultz vs. Pac. R. R., has never been before this court since the decision of that case, so far as I am aware, and as my convictions are very well settled that the critical analysis of that section by the learned judge who delivered the opinion of the court in that case, and the conclusions to which he arrived on such examination, are totally at variance with the true intent and meaning of the act, it is proper to explain my reasons for these convictions. In doing so, I speak for myself only and with the highest respect for the abilities and learning of the judges who have expressed a different opinion.

The cardinal rule in the construction of a statute is to look mainly at the intent of the law, the defect or grievance proposed to be remedied, and the means provided to effect such remedy. The common law axiom, that "*actio personalis moritur cum persona*," was the mischief which the legislature wished to abolish, and at the same time to point out the survivors who should have the right of action. The distinctions between the right of action in passengers and employees, and the cases in which the one or the other might maintain actions, were not in the mind of the legislature in framing this enactment. They were looking in a different direction; and the use of the term "person," in the first clause of the section, and the term "passenger" in the second, and of both "passenger or person" towards the conclusion, was merely a blunder of the draughtsman, who, disregarding all the rules of punctuation, and delighting apparently in obscure, complicated and tautological phraseology, seems, suddenly, after half completing the section, to have dropped in the word "passenger" at the very place where it ought to have been omitted, and left it out at the very place where it should have been inserted in order to have carried out the real design of the act. The word "person," if carried through the section would have answered, or the words "person or passenger" in all the clauses would have created no confusion or doubt.

There was no intention of establishing any new rules of liability for damages to the party injured, where he was alive and entitled to his action, but simply to extend the benefit of that liability to certain members of the family of the injured person, when death resulted from the injury. Had any such design been entertained, it was a simple and easy task to be accomplished in plain, clear and unmistakable language.

Those who are engaged in the interpretation of statutes. or of wills, or of written instruments of any description, are fully apprised of the necessity which frequently arises of disregarding words, or transposing them, in order to carry out the primary and leading design of the paper, whether it be an act of a legislative body, or the will or deed or contract of a private person. *Qui hæret in litera, hæret in cortice.*

The object of judicial tribunals is to carry out the intent; and if such intent can be clearly gathered from the whole instrument or act, it must be carried out, though to effect this a literal interpretation must be rejected or a restricted meaning be given to words or contiguous parts of the instrument, or sections of the law on the same subject be referred to.

Now the 3rd section of this act is upon the same subject, and has in view the same general object, though in the second section the remedy is confined to certain public institutions, (if we may call them so) whether corporations or not, established to afford facilities to the traveling public; and the third is designed to furnish redress for injuries occasioned by individuals who are not engaged in business of that character. Hence a discrimination is made in regard to damages; in the former case fixing it definitely; in the latter leaving it to juries according to the facts and circumstances of the case. But the 3rd section clearly announces the object of the legislature, which was to give no new cause of action, to legislate into existence no new grounds of recovery; but to give to certain representatives of a dead man a right of action, which did not before exist in such representatives, where the man if living would have had one, and in no other case.

Another leading maxim in the interpretation of statutes, is to reject an interpretation which conflicts with the views of the legislature apparent in the enactment, and leads to such consequences as it would be disrespectful to the legislature to suppose were designed. This is in truth a mere variation of the first principle named, which requires the intention to be carried out, though at a sacrifice of words.

The interpretation of the second section advanced in the Schultz case, enlarges the rights of the employees under the first clause, and abolishes the distinction between them and passengers, but destroys their rights under the second clause, where passengers only are named, and where the employees of the company, under the law as it existed before the passage of the act, were conceded to have a right of action, and where passengers also clearly had always a right of action apart from any legislative enactment. This seems strange in a law supposed and asserted to have had in view a change of the law as established in the case of McDermott vs. Pac. R. R. (30 Mo., 115.) Now in that case, and in all the cases that have followed (and they have been numerous) the right of an employee (as well as passenger) to recover for injuries occasioned by defective machinery, etc., is conceded. But adopting the literal interpretation of the second section, as given in the case of Schultz, as the word "passenger" alone is used in the second clause, this right of the employee is destroyed, so far as his representative is concerned, in the event of his death. Was this the design of the legislature? Clearly not. Had the word "person," or the words "person or passenger," been used throughout, from the beginning to the end of the section, the whole purpose of the act would have been evident and unambiguous.

But there are other difficulties in this interpretation, which I am unable to reconcile with what is assumed to be the object of the legislature. An employee of a railroad company, who is crippled to any conceivable extent, is not supplied with any remedy; but if he is killed outright, his wife or children or parents are entitled to $5,000. What motive

could prompt a legislature to such discrimination? It looks like a premium for homicide. Why should they allow a man's wife or children $5,000, where the husband or father is killed, and refuse to allow him anything when deprived of arms or legs, or both, and a hopeless, helpless cripple, and a mere incumbrance on his family? In the one case the family are deprived of the services of the head; but in the other, in addition to this deprivation, they have the burthen and expense of maintaining for life a helpless, perhaps bed-ridden cripple. I am unable to see any reason for such discrimination, and therefore am unwilling to impute to the legislature any intention of making it.

The doctrine first advanced by this court in the McDermott case, has been reviewed and sanctioned in various decisions since, and especially in the case of Gibson vs. Pac. R. R., (46 Mo., 163) in which Judge Wagner has collated all the English and American authorities, and declared it to be the settled law of the State. It had been asserted in the case of Rohback vs. Pac. R. R., (43 Mo., 192) and is re-asserted in Harper vs. Indianapolis & St. Louis R. R. (47 Mo., 567.)

If the legislature think it wise to abolish the distinction between passengers and employees, they will surely make no distinction in favor of the representative of the injured party and against the party himself. If abolished as to one, it will be abolished as to both. So far, in my judgment, they have left this branch of the law of negligence as they found it, and in the act concerning damages, had not in view the alteration of any responsibility of companies or individuals engaged in providing accommodations for public travel, but simply designed to extend a pre-existing responsibility to certain representatives of the injured party, in case of his death. It was not designed to change the law of contributory negligence, any more than it was intended to abolish the distinction between passengers and employees.

The fifth instruction in this case should have been given, if modified so as to hold the company responsible, notwithstanding Connor was conductor and manager of the train,

if the company had been guilty of negligence in employing an unskillful engineer, or allowing such engineer to turn over the engine to a fireman who was not qualified to manage it, and the damage resulted from the conduct of the engineer or fireman. There was evidence on this point.

In my opinion, however, the pleadings will have to be amended. The judgment is reversed and the cause remanded.

WAGNER, Judge, delivered the following dissenting opinion.

I concur in reversing the judgment on the last point discussed in the above opinion; but I do not wish to be understood as assenting to anything that goes to impair the authority of the case of Schultz vs. Pacific Railroad, and in this I am requested to say that Judges Vories and Sherwood agree with me.

PER HOUGH, Judge.

I concur in reversing the judgment in this case, but as I entertain a view of the construction which should be given to the second section of the damage act, upon which the plaintiff's action is founded, different from that placed upon it by any of my brother judges, I deem it proper to present that view in a separate opinion, together with my reasons therefor.

The petition in this case alleged that the death of the plaintiff's husband was caused by the negligence and unskillfulness of the officers, servants and employees of the defendant, whilst running, conducting and managing a locomotive and train of cars on defendant's railroad. There was no allegation of any want of care or diligence, on the part of the defendant, in the selection, or retention in service, of its servants in charge of the locomotive and cars. The alleged negligence and unskillfulness were denied, and an allegation in the answer, that the plaintiff's husband was, at the time of the injury resulting in his death, in the service of defendant, as brakeman, was admitted by the replication. The petition

did not definitely allege, nor did it clearly appear from the testimony, whose negligence occasioned the death of Connor. The gravel train on which he was at the time of his death, was, while being backed out of the way of a passenger train, run over a cow and precipitated down an embankment, and he was crushed in the wreck and killed. There were on the train at the time of the accident, only an engineer, fireman and one brakeman, besides Connor. The court at the instance of the plaintiff, gave among others, the following instruction:

"If the jury believe from the evidence, that the injuries from which Michael Connor died were received without fault or negligence on his part, and that the injuries from which he died resulted from or were occasioned by the negligence or unskillfulness of the officers, agents, servants, or employees of the defendant, whilst running, conducting or managing the locomotive or train of cars on which said Connor was, at the time of receiving said injury, then they will find for plaintiff." To the giving of which, defendant excepted.

Among other instructions asked by defendant, and refused by the court, was the following: "Plaintiff cannot recover on account of any negligence or unskillfulness of the other brakeman who was braking on the train at the time of the injury which resulted in the death of Connor." To the action of the court in refusing to give said instruction, defendant excepted. There was a verdict and judgment for plaintiff.

The sections of the damage act, the construction of which, is involved, are as follows: Sec. 2. "Whenever any person shall die from an injury, resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive, car or train of cars, or of any master, pilot, engineer, agent or employee whilst running conducting or managing any steamboat or any of the machinery thereof; or of any driver of any stage coach, or other public conveyance, whilst in charge of the same as a driver; and when any passenger shall die from any injury resulting from or occa-

sioned by any defect or insufficiency in any railroad, or any part thereof; or in any locomotive or car, or in any steamboat or the machinery thereof, or in any stage coach or other public conveyance, the corporation, individual or individuals, in whose employ any such officer, agent, servant, employee, master, pilot, engineer or driver, shall be at the time such injury is committed, or who owns any such railroad, locomotive, car, stage coach or other public conveyance, at the time any injury is received, resulting from, or occasioned by, any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying, the sum of five thousand dollars, which may be sued for and recovered; first, by the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or, third, if such deceased be a minor and unmarried, then by the father and mother who may join in the suit, and each shall have an equal interest in the judgment; or, if either of them be dead, then by the survivor. In suits instituted under this section, it shall be competent for the defendant, for his defense, to show that the defect or insufficiency named in this section was not of a negligent defect or insufficiency."

Sec. 3. "Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured."

Sec. 4. "All damages accruing under the last preceding section shall be sued for and recovered by the same parties and in the same manner as provided in the second section of this chapter, and in every such action, the jury may give such damages as they may deem fair and just, not exceeding five thousand dollars, with reference to the necessary injury re-

sulting from such death, to the surviving parties who may be entitled to sue, and also, having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default."

The common law rule that a servant cannot recover for injuries received in consequence of the negligence, or unskillfulness, of a fellow servant, unless the common master has been guilty of a want of diligence and care in the selection of the negligent or unskillful servant, or in retaining such servant after notice of his incompetency, is too firmly established by a long line of decisions of the highest courts, in England and in all the States of the American Union, where the question has arisen, to be now questioned or overthrown, save by legislative enactment.

Cases in Ohio, Kentucky and Georgia have been thought to break in upon this remarkable uniformity of decision, and announce a different rule; but the case of Whalen vs. Mad. R. and Lake Erie Railway Co., (8 Ohio St., 249) affirmed in Manville vs. Cleveland and Toledo R. R., (11 Ohio St., 417) conforms to the general rule; and the case of Louisville and Nashville R. R. Co. vs. Collins, (2 Duvall 114) held the company liable on the ground that the person injured was in a subordinate position, and not to be regarded as a fellow servant of the person causing the injury, thereby virtually affirming the correctness of the general rule. In the Georgia case, Scudder vs. Woodbridge, (1 Kelly, 195) generally cited as an exception, the person injured was a slave, and the court say, speaking of the rule laid down in Priestly vs. Fowler: "Interest to the owner and humanity to the slave, forbid its application to any other than free white agents." The subsequent case of Shields vs. Younge, Supt. Western and Atlantic R., (15 Ga. 349) and the case of Cooper vs. Mullins, (30 Ga., 151) recognize the rule, but limit its application by a restricted definition of the term, fellow servant. A rule so inflexibly adhered to in England, during a period of nearly forty years, and which has in a multitude of cases, at various times during a period of over thirty years, been sanctioned

and enforced by the concurrent judgment of many of the ablest judges of this country, and approvingly stated by our most learned commentators, must indeed be a wise and salutary one.

This rule is of universal application. It obtains not only where employees of railroads and other carriers are concerned, but it applies as well to laborers, operatives and employees in foundries, factories, mines, stores, hotels and warehouses, in short, wherever and in whatever employment, occupation, or business, the relation of master and servant exists, or may exist. In the language of the court in Fifield vs. Northern Railroad, (42 N. H., 225) "The responsibilities of the defendant and of the individual who hires two laborers in harvest, or two carpenters to erect staging and shingle houses, are to be determined by the same legal tests."

This rule, like that which holds the common carrier of goods to the liability of an insurer, the act of God and the public enemy excepted, and exacts the highest degree of care, vigilance and skill of carriers of passengers, is founded in considerations of expediency and public policy. In the language of Baron Abinger, in the leading English case, (Priestly vs. Fowler) "In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages, could possibly afford."

In the leading American case, Farwell v. The Boston & Worcester Rail Corp., 4 Met., 49, Chief Justice Shaw says: "Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the con-

duct of the others, can give notice of any misconduct, incapacity or neglect of duty and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured, than could be done by a resort to the common employer for indemnity, in case of loss by the negligence of each other. Regarding it in this light it is the ordinary case of one sustaining an injury in the course of his employment, in which he must bear the loss himself or seek his remedy, if he have any, against the actual wrong-doer."

The same rule has been repeatedly announced by this court. (McDermott vs. P. R. R., 30 Mo., 115; Rohback vs. P. R. R., 43 Mo., 192; Gibson vs. P. R. R., 46 Mo., 163; Harper vs. Ind. & St. Louis R. R., 47 Mo., 567; Moss vs. P. R. R., 49 Mo., 167; Devitt vs. P. R. R., 50 Mo., 302; Brothers vs. Carter, 52 Mo., 372.)

Passengers and employees compose the two classes of persons mainly interested in the management of trains, and the character and quality of the means of transportation employed; and while provision against danger and injury to each of these classes is always required, the security of the passenger is of primary importance, and the common law liabilities to each, are based upon the different character of the relations held, by each, to the carrier. The transportation of the passenger, with expedition and safety, is the sole purpose of the employment by the carrier of servants for the management of passenger trains. The servant and the master are, as to the passenger, but a single person, and as to him, no degree of diligence and circumspection on the part of the master in the selection of his servants, will exempt the carrier from liability for injuries arising from the negligence or unskillfulness of his servants. The negligence of the servant is, in such case, the negligence of the master.

But in case of an injury to a passenger, arising from insufficient or defective carriages, or machinery, the carrier may excuse himself by showing that he exercised the utmost care

and diligence in providing such carriages and machinery, and that the defects, producing injury, could not have been discovered by the most careful and thorough inspection. (Redfield's Am. Railw. Cas., 471.)

So, too, the employee has a right of action against the master for injuries arising from defective or insufficient machinery, implements or appliances, furnished by the master to him, if the master has been guilty of negligence or want of proper care in providing such machinery, implements or appliances, and the servant used the same without any knowledge that they were defective, or insufficient. (Gibson vs. P. R. R., 46 Mo., 163 and cases cited; Devitt vs. P. R. R., 50 Mo., 302 and cases cited.)

The construction placed upon the second section above quoted, by the able and accomplished judge who delivered the opinion of the court in the case of Schultz vs. P. R. R., 36 Mo., 13,) obliterates, to some extent, the foregoing distinctions, and in my judgment, confounds the wisdom of the common law, and leads to consequences grossly incongruous and palpably unjust. It is held in that case, that the words "any person" in the first clause of the second section, include fellow servants, or co-employees, as well as passengers and strangers, and that in an action by the representatives of an employee, under the provisions of that section "there need be no proof (in such case) of any negligence or want of care and diligence on the part of the employer, in selecting his agent and servant, for the act does not rest the liability on any negligence of that kind, though the liability at common law, for injuries occasioned by such negligence may still remain, as before, unaffected by the statute."

Under this construction, a servant who is injured by the negligence of a fellow servant, without any fault or negligence on the part of the common master in the selection, or retention, of such negligent servant, though reduced to a condition of permanent and helpless dependence, and thereby rendered an object of constant care, commiseration and expense to his family, can recover nothing; whereas, if his injuries should re-

sult in death, though that death should occasion less painful and disastrous consequences to his family than a life of lingering agony and destitution, his representatives can recover the sum of five thousand dollars. No motive of charitable benevolence, or dictate of public policy, can in my judgment justify such a distinction. Again, what wise purpose is to be subserved in providing by statute, a gratuitous life insurance of five thousand dollars, in favor of representatives of the employees of carriers, against the negligence of their fellow servants, thus making them a favored class, while no such statutory legacy is provided for the myriads of operatives and employees engaged in every department of labor and business throughout the State, many of whom are, equally with the employees of carriers, exposed to danger and death from the nature of their service, and are not inferior to them perhaps in culture, character and personal worth, and whose lives are of equal value to their families and to society. I cannot think that the legislature intended any such unjust discrimination. Certainly, no additional security to the traveling public could be expected to result therefrom, in view of the combined and oft-repeated judgment of the Bench of England and America during nearly half a century, that the greatest security, in this regard, is to be attained by the enforcement of the common law rule. Besides, the statute is as applicable to trains, boats and vehicles, which carry freight only, as to those which carry passengers. And if such were the object of the legislature in the enactment of the second section, why did they not give the servant a right of action, when injured through the negligence of a fellow servant, the master not being in fault, though death should not ensue? Any negligence, producing injury, should, if such were the purpose, give a right of action, and not negligence producing only mortal injury. The grossest negligence may sometimes be capriciously followed by slight injury, and the slightest neglect may at other times be attended by the most disastrous consequences.

Again, what satisfactory reason can be assigned for giving the representatives of an employee of a carrier, a right of action for an injury resulting in death, occasioned by the negligence of a co-employee, in managing a locomotive or train of cars, without any proof of negligence on the part of the master, and denying a right of action for an injury resulting in death, occasioned by a defect or insufficiency in the machinery and means of transportation employed, unless the master has been guilty of negligence in providing or continuing to use the same? Public policy as imperatively demands perfect machinery and appliances as it does diligent servants. If any distinction should be made in this regard, as between master and servant, it would seem that the rule, as stated above, should be reversed; and in case of death, the master held absolutely liable for defective machinery furnished to the servant, and only conditionally liable for the negligence of those human agencies employed by him, having freedom of volition and action, and whose motives and conduct he cannot always foresee or control.

Again, why should the representatives of the servant of a carrier, be entitled to recover the sum of five thousand dollars, for the negligence of a fellow servant producing his death whilst running, conducting and managing a locomotive or train, which does not carry passengers, where the master is not in fault, and no such right be given to the representatives of a servant of a carrier killed by the negligence, or unskillfulness of a fellow servant when jointly engaged in any other service of the carrier?

Again, why should the representatives of an employee killed by the negligence of a fellow servant, be entitled to recover from the master who has been guilty of no fault, the sum of five thousand dollars absolutely, and when killed by defective machinery through the fault of the master himself, be entitled to recover under the third section, such sum as a jury may deem fair and just, not exceeding the sum of five thousand dollars, reference being had to the necessary injury resulting from such death, to the parties entitled to sue, and

also to the circumstances attending the neglect or default producing the death?

The foregoing are some of the incongruities attending a literal interpretation of the words "any person" in the second section. And if we are "to stick in the bark," I do not see why, under the first clause of that section, a recovery may not be had, even where the employee may have himself been guilty of negligence contributing directly to occasion his death; for such negligence is not inconsistent with negligence on the part of a fellow servant, without which, the injury and death could not have occurred. Contributory negligence, as the designation itself implies, can only exist where the injury is the result of the combined negligence of the plaintiff and defendant. Where plaintiff's negligence is the sole cause of the injury, it is not contributory. But as this is a common law defense, not provided for by the statute, which is and must always be allowed against "any person," whether passenger, stranger or employee, what warrant is there in the statute for saying that no other common law defense shall be permitted. If the language of the statute must be relaxed to admit one common law defense, why should the other common law defense be denied, that where "any person," injured and dying, happens to be a fellow servant of the servant or employee, causing his death, there can be no recovery unless some negligence of the master be shown in the selection, or retention of such servant? Admit such a defense, and the statute would still give a right of action to the representatives of those employees who are not fellow servants of the servant, causing by his negligence, their injury and death.

In ascertaining the intention of the legislature, which is the object to be attained in the construction of all statutes, we are not always limited to the language of the act. Courts are to consider the subject matter, the effects and the reason of the statute, in order to discover the intention. "Those statutes which comprehend all things in the letter, they (the sages of the law) have expounded to extend to but some things; those which generally prohibit all people from doing such an

act, they have interpreted to permit some people to do it, and those which include every person in the letter, they have adjudged to reach some persons only."

Nor are we without authority as to the construction of the words "any person" in similar statutes in this State, and in other States.

In the revised statutes of Maine, was the following section. "Every railroad corporation shall be liable for all damages sustained by *any person*, in consequence of any neglect of the provisions of the foregoing sections, or of any other neglect of any of their servants, or by any mismanagement of their engines, in an action on the case, by the person sustaining such damages." In the case of Carle vs. Bangor & Piscataquis Canal & R. R. Co., 43 Me., 269, the words "any person," in this statute, were held not to include servants of the defendant, who were injured by their fellow servants, and the court say "statutes, unless plainly to be otherwise construed, should receive a construction not in derogation of the common law."

The words "any person" in a similar statute of Iowa, were in the case of Sullivan vs. Mississippi & Missouri R. R. Co., 11 Iowa, 421, held not to include fellow servants. That statute was as follows: "Every railroad corporation shall be liable for all damages sustained by *any person* in consequence of any neglect of the provisions of this act, or of any other neglect of any of their agents, or by any mismanagement of their engineers, by the person sustaining such damages."

The thirty-eighth section of the general corporation law, applicable to railroad companies in this State, makes it incumbent on all railroad companies to have a bell placed on each locomotive engine, to be rung at a distance of at least eighty rods from the place where the railroad shall cross any traveled public road or street, and kept ringing until it shall have crossed such road or street, or to sound a steam whistle, except in cities. The last clause of the section is as follows: "And said corporation shall also be liable for all damages which shall be sustained by *any person* by reason of such neglect."

The words "any person" in this clause were held, in the case of Rohback vs. P. R. R. (43 Mo., 187), not to include fellow servants. In that case the court say, "It is obvious that the enactment of the law was intended primarily for the protection of the traveling public and passengers;" and further, "that the draftsman of the law used the word "person" in the sense that it should apply to the classes above referred to, and without any intention of changing the common law construction, can scarcely be questioned." After referring to the second section of the damage act, and the Schultz case, (36 Mo., 13) the court further say, "both acts were passed by the same legislature. They show clearly that the law as it existed was understood by that body; that in one case a modification was intended to be made, and in the other not. If it had been intended that the 38th section should change the law, so as to allow persons to sue, who had been previously barred, words of similar import to those used in the damage act would have been employed." The letter of the statute is thus made in that case to yield to the intent of the legislature. I have attentively considered these two sections, and with the highest respect for the great abilities of the learned judge who delivered the opinion of the court in the Rohback case, I feel compelled to say that I am unable to perceive how the use of the words employed in the first clause of the second section of the damage act, can indicate that a modification of the common law was intended, if the words employed in the thirty-eighth section of the corporation law, fail to indicate an intention to change the common law. If the naming in the damage act of the servants and employees whose negligence or unskillfulness shall give a right of action to the representatives of "any person" dying from injuries thereby received, can be claimed to constitute the distinction, I can still see no real difference between the two provisions. The thirty-eighth section clearly contemplates that the bell required to be placed on each locomotive, shall be rung by the servants of the company in charge of such locomotive, and the remedy is as clearly given to "any person" who shall be

injured in consequence of the failure of any servant or employee of the company to ring said bell as therein required. Rohback, injured, but living, had no right of action for the injuries inflicted in consequence of the failure of the servants of the company to ring the bell, and yet had he died from such injuries, under the rule laid down in the Schultz case, his representatives could, on the same state of facts, have recovered five thousand dollars; for it would undoubtedly have been held, that the failure to ring the bell or sound the whistle constituted negligence on the part of the servant or employee in charge of, or running, conducting and managing the locomotive. The decision in the Rohback case is supported by reason and authority, and is undeniably right, on the point involved, but I cannot concur in its indorsement of the Schultz case.

It is evident to my mind, from the whole scope of the damage act, that the purpose of the legislature in the second section, was simply to cause those actions to survive to certain representatives of the deceased, in the cases there named, which according to the rules of the common law died with the person, and to limit the amount of the recovery in such cases. No new right of action is given by the third section; no new right of action is given as to passengers or strangers in the second section; that is to say, the right of action which the passenger himself or a stranger, would have had, if injured, but not killed, is made in the event of death, to survive; and if the words, "any person" shall be held to mean passengers and strangers, and such employees only as are not fellow servants of those causing their death, then no new liability will be created as to any one, by the second section, and the several parts of this statute will constitute a consistent and harmonious whole.

The injustice and impolicy of such a construction of the second section as would, to use a pardonable solecism, make a right of action survive which had no existence either at common law or by statute, is, I think, manifest. The legislature did not intend to create new liabilities out of [illegible]

tion of master and servant. It was not legislating upon the relation itself, but was concerned only in making common law remedies to survive. The only object of the second section was to give to the representatives of all persons, who could have maintained an action at common law, if death had not ensued, in the cases therein enumerated, the liquidated sum of five thousand dollars; and the object of the third section was to give in all other cases, where an action could have been maintained at common law, such sum as the jury might deem fair and just, not exceeding five thousand dollars, regard being had to the attendant circumstances; and this section applies to the employees of carriers, as well as to other persons. (Brownell vs. P. R. R., 47 Mo., 242; Moss vs. P. R. R., 49 Mo., 167; Devitt vs. P. R. R., 50 Mo., 302.)

I am of opinion, therefore, that the doctrine of the Schultz case should not be adhered to; and as all persons on the train, who were charged with having occasioned, by their negligence and unskillfulness, the death of Connor, were his fellow servants, I think that plaintiff's first instruction should have been refused, and the sixth instruction asked by the defendant should have been given.

END OF FEBRUARY TERM, 1875, AT ST. JOSEPH.